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# BALANCING ACTS: CRISIS, CHANGE, AND CONTINUITY IN AMERICAN FAMILY LAW, 1890-1990

MICHAEL GROSSBERG\*

## INTRODUCTION

The Symposium to celebrate Indiana University School of Law at Indianapolis's Centennial has given me an opportunity to think broadly about family law over the last hundred years. In contemplating the Symposium theme, "Then, Now and Into the Future," I have been struck by questions of time and timing, and how they affect the way we think about the present, the past, and the relationship between the two. Asked to compare family law in the 1890s and 1990s, I am struck by obvious parallels. Then and now, the widespread conviction that families constituted the bedrock institution of our society made Americans particularly sensitive to what goes on in the nation's homes. Then and now, family change provoked fears that all was not well in the household and thus the republic. Then and now, newspaper stories chronicled rising divorces, juvenile crime, dead-beat fathers, abusive parents, and neglected children. And, then and now, law seemed an inviting arena in which family problems could be addressed. In other words, thinking about the family and its law, the distance between then and now does not seem very great. And yet, of course, in many other ways, family controversies are not the same. Test-tube babies and surrogate motherhood suggest the differences.

Nevertheless, what has struck me the most about a comparison of family law in 1890s and 1990s is not so much the commonality or differences in particular issues or even in the importance placed on family well-being, but rather the persistent way we talk about the complex relationship between families and law. As my contribution to the centennial discussion on law then and now, I want to offer a speculative synthesis suggesting that we have inherited a way of talking about American family law that fundamentally frames our disputes over marriage, divorce, child custody, abortion, and the other contested family questions of our time. I want to argue that at any particular time during the last century, this way of talking about family law highlights certain issues while marginalizing or even silencing others.

This persistent discourse of domestic relations has two critical components. First, we tend to talk about family law problems in metaphoric terms of balancing. Teeter-totter-like, we speak of balancing individual and family rights and autonomy with state interests, legitimation, and regulation. Examples fill every chapter of the domestic relations texts used in classes in 1894 and 1994: the right to wed and the state regulation of marital choices, the right to leave a troubled marriage and the state interests in family preservation, the right to a child and the public interest in child protection, and so forth.<sup>1</sup>

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1. For an insightful discussion of the use of such metaphors in family law, see Lee E. Teitelbaum, *Family History and Family Law*, 1985 WIS. L. REV. 1135. For a useful discussion of literature on legal balancing, see Stephen E. Gottlieb, *The Paradox of Balancing Significant Interests*, 45 HASTINGS L. J. 825 (1994).

Second, I think that the sides shift in these rhetorical balancing acts because of critical timebound elements that spring from the constant reality of American family diversity. That is, now, as at any moment in the past, there is *no single American family*. Quite the contrary, there are, and always have been, a wide range of family forms and choices. Debate focuses on the legal standing of these various family forms, and it generally emerges in contests between what I would call functional families and ideological families. Functional families are those various ways women, men, and children actually live together; ideological families are the forms of family life recognized in the public narratives of the law.<sup>2</sup> Public narratives are the official stories embedded in statutes, legal doctrine, administrative directives, and the other dominant forms of public authority. The two do not always coincide, and they often occupy different sides of family law's teeter-totter. Clashes over them provoke debate and controversy because they raise the basic questions of family law: What is a legal family? What are the responsibilities of family members to each other and to the community? Who can marry and form a legal family? Who ought to be recognized as a parent? Answers to these questions repeatedly upset the legal balance and spill out into the public sphere. They did in 1894; they do so now.

I want to use a couple of examples to illustrate the character of the dominant domestic relations discourse, and in so doing, suggest some of its implications. I want to do so by briefly outlining the shifting debates about marital choice and child custody over the last hundred years. I think these debates occurred in two distinct timebound moments. In other words, I want to periodize the history of family law over the last century to suggest that the law's dominant discourse had timebound dialects.<sup>3</sup> The first era stretched from the late nineteenth century to about the Great Depression; the second, from the depression into our time. In each era, dominant approaches defined family law by using clashes between functional families and ideological families to set the law's balance and frame lay and professional debate about family regulation. By talking in admittedly general terms about marital choice and custody in these two eras, I want to sketch quite broadly some thoughts on what has changed in family law, what has not changed, and the meaning of both change and continuity.

By adopting a periodized comparison, I will necessarily emphasize difference over similarity. And so before looking at these two eras, I want to add an aside on family law continuity. As evident in my initial simple comparisons of the 1890s and 1990s, continuity as well as change have marked the history of American family law over the last century. What Willard Hurst calls "drift" is always at play in every legal category. Drift, I take to mean the on-going elaboration of dominant legal trends.<sup>4</sup> A catalogue of family law drift is quite lengthy: the legal individualization of family members, the reliance on experts in resolving family disputes, the use and legitimacy of divorce, the codification

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2. For a helpful discussion of functional families, see Martha L. Minow, *Redefining Families: Who's In and Who's Out?* 62 U. COLO. L. REV. 269 (1991). For an analysis of public narratives, see Margaret R. Somers, *Narrativity, Narrative Identity, and Social Action: Rethinking English Working-Class Formation*, 16 SOC. SCI. HIST. 591 (1992).

3. I do so in agreement with Peter Stearns that periodization is one of the most significant forms of analysis that historians can contribute to debates about public policy, *History and Policy Analysis: Toward Maturity*, PUB. HISTORIAN 5 (Summer 1982).

4. JAMES WILLARD HURST, *LAW AND SOCIAL ORDER IN THE UNITED STATES* ch. 5 (1977).

of key family law rules, the bureaucratization of family law institutions, the ever greater segmentation and refinement of domestic relations rules, and the federalization of family law. These trends were evident in 1890, and they are even more visible today. They are clearly critical to the character of family law at any particular time and over time. But I think that in a symposium like this one, selective differences are more revealing than these continuities. In examining these differences, I rely on a central tenet of comparative analysis advanced by French historian Marc Bloch. He argued that the most revealing comparisons proceeded from surface sameness to underlying differences.<sup>5</sup> In terms of family law, I think that both the importance placed on families and the tendency to discuss family law in terms of balancing provided the surface sameness, while the realities of and reactions to family diversity reveal underlying differences between recent eras in family law. In other words, I want to suggest that what is contested, and why, helps us understand the lineaments of family law and better equips us to analyze both legal continuity and change.

### I. FAMILY LAW PATERNALISM

When students began learning the law at Indiana University School of Law in 1894, domestic relations was a relatively new category of American law. Its first major compilation, James Schouler's *Law of Domestic Relations*, had been published only twenty years earlier. Until then, family law had been scattered about the legal landscape. Categorization not only brought rules together, but marked off the family as a particular realm of legal experience.<sup>6</sup> Nevertheless, it was a realm in turmoil. Many of domestic relations law's key doctrines were being contested, revised, and even repealed.

Legal conflict was a flank of the larger social crises of the era. In a time overwhelmed by economic and social upheaval, panic about the family grew. Fear spread that urbanization, industrial capitalism, and massive immigration were undermining the nation's homes and thus, the republic itself. Rising divorces, delayed marriages, shrinking birth rates, growing juvenile delinquency, and the proliferation of family forms fed fears that the family was disintegrating.<sup>7</sup>

These fears resulted in a "moral panic" over the family. That is, a moment in time emerged when widespread fears and anxieties crystallized on a specific object of concern—the family. This moral panic became the single most important source of family law reform. Equally important, during such panics popular fears are often displaced onto folk devils—individuals and groups singled out as particular sources of evil.<sup>8</sup> That is precisely what occurred during this family crisis. Families and family

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5. For a discussion of Bloch's work, see William H. Sewell, Jr., *Marc Bloch and the Logic of Comparative History*, 6 HIST. AND THEORY 208 (1967).

6. For an analysis of the creation of domestic relations as a legal category, see MICHAEL GROSSBERG, GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH CENTURY AMERICA ch. 8 (1985); Carl Schneider, *The Next Step: Definition, Generalization, and Theory in American Family Law*, 18 MICH. J. L. REFORM 1039 (1985).

7. GROSSBERG, *supra* note 6, at 9-12.

8. For a discussion of moral panics and folk devils, see STANLEY COHEN, FOLK DEVILS AND MORAL PANICS: THE CREATION OF THE MODS AND ROCKERS (1980).

practices outside the majoritarian norm were labeled as deviant and targeted for sanction. Groups of self-proclaimed family savers, like the National League for the Protection of the Family, demanded social order, cultural uniformity, and the maintenance of what they considered traditional values. As Elaine May argues, "Victorians waged a vigorous campaign to bring outsiders into the fold. They used every means of persuasion or coercion within their power to encourage, or even force, conformity to the code."<sup>9</sup>

Many of those means entailed greater state regulation. Assuming a fundamental division between the public and the private, reformers demanded state intervention into what had been considered the family's autonomous decisions about work, education, health, and welfare. Their demands assumed that families should no longer be left as free to govern themselves, and that American households needed both the guidance and the agents of an increasingly therapeutic state. As Marilyn Brady explains:

Declaring a crisis in the American family and a threat to national greatness, some reformers sought to insure that couples would continue to get married, to stay married, and to have as many children as had the couples of a generation earlier. They supported legislation to tie women more closely to the home. In their view, the government needed to step in to save the family from sons and daughters unwilling to duplicate their parents' lives and from those who had always lived outside the middle class.<sup>10</sup>

Law became a critical arena during this moral panic. Charges that nuptial and family diversity undermined the nation's homes led to demands for greater policing of domestic relations. But family law did not merely mirror the social crisis. Instead, as always, an interactive process between law and society made domestic relations both a source and a product of the debates of the period. Family saving was translated into the already functioning discourse of domestic relations. A spate of paternalistic laws and doctrines tilted family law away from individual and family rights toward public regulation. A new public narrative framed debate about family law among litigants, lawyers, judges, and laypeople. Its dominant story line emphasized the need for a more uniform family ideology and the disastrous consequences of recognizing functional families that did not conform to those standards. As a result, family law contests were expressed primarily as battles between a dominant paternalism and a deviant libertarianism.

Consequently, during the years around the law school's founding, family law debate focused on the continued legitimacy of statutes and doctrines from the antebellum era that had generally tolerated, if not actually fostered, family diversity. From the creation of common law marriage and the granting of inheritance rights to illegitimate children to the limited restrictions on abortion and the conferral of property rights on married women, family law created in the years from the American Revolution to the Civil War tended to legitimate functional families. The law's public narrative, in other words, was generally inclusive rather than exclusive. It projected multiple images of legitimate families and

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9. ELAINE T. MAY, *GREAT EXPECTATIONS: MARRIAGE AND DIVORCE IN POST-VICTORIAN AMERICA* 21 (1980).

10. Marilyn D. Brady, *The New Model Middle-Class Family*, in *AMERICAN FAMILIES: A RESEARCH GUIDE AND HISTORICAL HANDBOOK* 106 (Joseph M. Hawes & Elizabeth I. Nybakken eds., 1991). *See also* ROBERT L. GRISWOLD, *FATHERHOOD IN AMERICA: A HISTORY* 31-32 (1993).

family members.<sup>11</sup> The moral panic experienced by countless turn-of-the-century Americans eroded the confidence critical to that tolerant family law. Instead, reaction set in and upset the law's balance. As this school was founded, reaction was at high tide. We can see its effects in the way people of the period talked about the law of marriage and custody.

### A. Marriage

Demands for greater regulation of marriage topped the agenda of family savers. Fearing the social consequences of marital failure, they wanted to preserve the family by limiting the marital freedom secured during the antebellum era. Law framed their efforts. "A good marriage code," sociologist George Howard argued in 1910, "tends to check hasty, clandestine, frivolous, and immature wedlock. A bad marriage law favors such unions, which so often end in divorce court."<sup>12</sup> The triumph of a participant run marriage system based on individual choice and romantic love had helped spawn the tolerant marriage code now under attack.<sup>13</sup> Agitation for regulation challenged that toleration with the assertion that getting married should be considered less of a private and more of a public matter. The demand had clear sources in both popular and legal practice. Continuing earlier practices, countless individuals in the late nineteenth and early twentieth centuries claimed the right to wed persons of their choice and to gain legal recognition for their unions. The most dramatic, and most successful, example occurred in the post Civil War South as thousands of freed slaves roamed the countryside to reunite broken families and cover extra-legal slave unions with law.<sup>14</sup> Individual crusades like this one had utilitarian and symbolic goals. Marriage gave couples property, residential, and other rights; it also secured the public stamp of approval for their unions. And for the same reasons, denial barred couples from those legal privileges and symbols of public acceptance. Denial became the dominant discourse of the day. It tilted the balance in the law away from an earlier emphasis on individual choice and marital pluralism toward new expressions of state regulation and nuptial uniformity.

One individual crusade for marital freedom led to the most important and most telling judicial invocation of public matrimonial authority in *Maynard v. Hill*.<sup>15</sup> David S. Maynard, a founder of the State of Washington and the city of Seattle, wanted to rid himself of his first wife. The territorial legislature of Oregon, which had jurisdiction over what would become Washington state, complied. When the United States Supreme Court later confronted a challenge to the legitimacy of that act, Justice Stephen Field responded with a ringing endorsement of state regulatory authority over marriage:

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11. These points are drawn generally from GROSSBERG, *supra* note 6. As in so much of American law, race was the major exception to this trend. The ban on slave marriage was the most grievous denial of marital freedom in the era.

12. Quoted in GROSSBERG, *supra* note 6, at 85.

13. See KAREN LYKSTRA, *SEARCHING THE HEART: WOMEN, MEN, AND ROMANTIC LOVE IN NINETEENTH CENTURY AMERICA* (1989).

14. See LEON LITWACK, *BEEN IN THE STORM SO LONG: THE AFTERMATH OF SLAVERY* ch. 5 (1979).

15. 125 U.S. 190 (1888).

It is also to be observed that, whilst marriage is often termed by text writers and in decisions of courts a civil contract—generally to indicate that it must be founded upon the agreement of the parties, and does not require any religious ceremony for its solemnization—it is something more than a mere contract. The consent of the parties is of course essential to its existence, but when the contract to marry is executed by the marriage, a relation between the parties is created which they cannot change. Other contracts may be modified, restricted, or enlarged, or entirely released upon the consent of the parties. Not so with marriage. The relation once formed, the law steps in and holds the parties to various obligations and liabilities. It is an institution, in the maintenance of which in its purity the public is deeply interested, for it is the foundation of the family and of society, without which there would be neither civilization nor progress.<sup>16</sup>

*Maynard* expressed the changing tenor of debate about marriage in the era. Still considered a “civil contract,” the legal emphasis shifted from the second word to the first. As Walter O. Weyrauch and Sanford Katz explain, “[t]he case is cited in the context of constitutional attacks on legislation having an impact on marriage . . . . In actual practice, consequently, *Maynard* can be cited whenever an argument in support of the police power of the state to regulate marriage is made.”<sup>17</sup>

The major legal debates about marriage took place in the states, which retained primary control over domestic relations. Legislators took the lead in trying to change the law’s balance. They drafted marriage codes that sought to stifle marital diversity by making it harder to wed. By the 1920s, every state had revised its law to impose greater controls on the right to marry. The new codes limited both who could wed and whom a person could wed, and thus denied legitimacy to functional families that considered the unions that created them legitimate.

Though there were significant jurisdictional variations, marriage law reform included a number of common features and common themes. George Howard, for instance, expressed the breadth of the shifting emphasis in marriage law when he campaigned against retention of the traditional nuptial ages of twelve for females and fourteen for males. “Majority is the law’s simple device for securing mental maturity in the graver things of life,” he argued. “Is not wedlock as serious a business as making a will or signing a deed?”<sup>18</sup> As a result of such arguments, states gradually raised the age of consent to marriage, most commonly to sixteen for females and eighteen for males.

Even more telling were nuptial restrictions inspired by the transmission of disease. A major legal departure, they arose from a new assumption that physical defects in

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16. *Id.* at 210-11.

17. WALTER O. WEYRAUCH & SANFORD N. KATZ, *AMERICAN FAMILY LAW IN TRANSITION* 59-60 (1983). See also Stephen H. Hobbs, *In Search of Family Value: Constructing a Framework for Jurisprudential Discourse*, 75 MARQ. L. REV. 529, 544-56 (1992).

18. Quoted in FRED S. HALL & ELISABETH W. BROOKE, *AMERICAN MARRIAGE LAWS IN THEIR SOCIAL ASPECTS: A DIGEST* 18 (1919). See also FREDERIC J. STIMSON, *AMERICAN STATUTE LAW: AN ANALYTICAL AND COMPARED DIGEST* 665-66 (The Boston Book Co. 1886); Anne G. Spencer, *The Age of Consent and Its Significance*, 49 FORUM 406 (1913).

themselves abrogated nuptial rights because the state was obliged to defend itself against unhealthy offspring and the pollution of the marriage bed by disease. In 1910, political scientist Frederic Stimson pinpointed the essence of the change: "To-day we witness the startling tendency for the State to prescribe whom a person shall not marry, even if it does not prescribe whom they shall. The science of eugenics . . . will place on the statute books matters which our forefathers left to the Lord."<sup>19</sup>

The eugenics crusade, which crested between 1885 and 1920, had a direct and longlasting effect on marriage law. It helped tilt the legal balance toward regulation and uniformity. Under the sway of eugenic beliefs, restraints on individuals afflicted with mental and physical maladies reoriented the traditional physiological impediments to matrimony. The additions ensured that nuptial prohibitions contained explicit medical as well as contractual means of assessing nuptial fitness. By the 1930s, forty-one states had enlarged the common law tests of mental capacity for marriage with statutes that used the terms "lunatic," "feeble-minded," "idiot," and "imbecile" to deny marital rights. The acts, and complementary judicial opinions, indicated a determination in this era to abrogate the common law defense of contractual nuptial rights in reaction to a perceived biological threat to families and public safety.<sup>20</sup> As the Connecticut Supreme Court declared in 1905:

Laws of this kind may be regarded as an expression of the conviction of modern society that disease is largely preventable by proper precautions, and that it is not unjust in certain cases to require the observation of these, even at the cost of narrowing what in former days was regarded as the proper domain of individual right.<sup>21</sup>

Similar fears spawned the creation of venereal disease testing requirements for brides and grooms. In 1913, Wisconsin became the first state to require that prospective grooms submit to medical tests. Rebuffing challenges that the act interfered with religious freedom and unreasonably restrained individual rights, the state supreme court upheld the law and declared that "[s]ociety has a right to protect itself from extinction and its members from a fate worse than death."<sup>22</sup> Despite complaints about unreliable tests and continued charges that they violated individual rights, other states followed suit. Disease-inspired fears, improved detection, greater documentation, and growing popular faith in therapeutic regulation helped make prenuptial medical examinations standard American experiences. And to emphasize the point, by the 1930s, over twenty-six states and territories had imposed criminal penalties on those who wed while infected.<sup>23</sup>

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19. FREDERIC J. STIMSON, *POPULAR LAW-MAKING: A STUDY OF THE ORIGIN, HISTORY, AND PRESENT TENDENCIES OF LAW-MAKING BY STATUTE* 327 (1910).

20. See 1 CHESTER VERNIER, *AMERICAN FAMILY LAWS 190-95* (1931); Sydney Brooks, *Marriage and Divorce in America*, 84 *FORT. REV.* 329, 333 (1905); *Eugenic Marriage Laws*, 105 *OUTLOOK* 342 (1913).

21. *Gould v. Gould*, 61 A. 604, 605 (Conn. 1905).

22. *Petterson v. Widule*, 147 N.W. 966, 968 (Wis. 1914).

23. FRED S. HALL, *MEDICAL CERTIFICATION FOR MARRIAGE: AN ACCOUNT OF THE ADMINISTRATION OF THE WISCONSIN LAW* (1921); FRED S. HALL & MARY RICHMOND, *MARRIAGE AND THE STATE* 58-63 (1929). See also 1 VERNIER, *supra* note 20, at 199-203; Charles H. Haberich, *Venereal Disease in the Law of Marriage and Divorce*, 37 *AM. L. REV.* 226 (1903); Jacob Lippman, *The Sexual Aspect of Juridical Marriage*, 65 *AM. L.*



Sterilization, the most extreme eugenic measure, crowned the campaign to curtail the nuptial freedom of the unfit. By permanently preventing the mentally, physically, and morally defective from procreating, reformers hoped to allow these unfortunates to rejoin society and enjoy the solace and controls of matrimony. By 1931, twenty-seven states had enacted some form of mandatory sterilization. Despite fierce debate over the legitimacy of the acts, sterilization received the imprimatur of the Supreme Court in 1927, when Justice Oliver Wendell Holmes, Jr. approved the sterilization of eighteen year old Carrie Buck, a mentally impaired Virginia woman. Voicing the fears of the day and the determination to tilt the law toward greatly increased public surveillance of marriage, Holmes declared, "It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind."<sup>24</sup>

The most direct attack against functional marriages came in challenges to the legitimacy of common law marriage. A creation of the antebellum era, common law marriage allowed couples to form their own binding unions without benefit of formal ceremonies and in defiance of state marital regulations. It became the symbol of regulatory laxity for those who feared marital freedom and nuptial diversity. Reformers charged it with spawning social anarchy and untrammelled individualism, and they dismissed pleas that common law marriage protected children from illegitimacy and women from sexual exploitation. Such sentiments had been convincing in the previous period, but now they went unheeded. Instead, reformers contended that common law marriage protected the disreputable acts of an immoral minority and bred blackmail, fraudulent estate claims, and sexual license. Demanding a new legal balance that would deny legality to such unions, Howard claimed:

In no part of the whole range of human activity is there such imperative need of state interference and control as in the sphere of the matrimonial relations. In this field as in others we are beginning to see more clearly that the highest individual liberty can be secured only when it is subordinated to the highest social good.<sup>25</sup>

By the end of the 1920s, the states were evenly divided between those who allowed common law marriages and those who forbade them. At the same time, laws requiring a marriage license steadily spread. By 1932, all but three states required licenses.<sup>26</sup>

Complementary changes in divorce law also helped rephrase marital debates. Responding to the fact that the United States had the highest divorce rate in the world, state legislatures tried to stem the tide by making it more difficult to end a marriage. Reform emphasized marital permanence with the enactment of restrictions on remarriage after divorce, longer residence requirements, and reduced grounds for divorce. Equally important, divorce statutes retained the commitment to the fault standard. A marriage

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REV. 136 (1931).

24. *Buck v. Bell*, 274 U.S. 200, 207 (1927). See also MARK S. HALLER, *EUGENICS; HEREDITARIAN ATTITUDES IN AMERICAN THOUGHT* 130-41 (1963).

25. 3 GEORGE HOWARD, *A HISTORY OF MATRIMONIAL INSTITUTIONS* 184 (1904).

26. Otto E. Koegel, *Common Law Marriage*, 4 FAM. 172 (1923); Fred S. Hall, *Marriage and the Law*, 160 MODERN AM. FAM., ANNALS 110-15 (1932).

would be terminated only when a spouse was proven to have committed a serious matrimonial crime. Such a tilt in divorce law echoed the new balance in marital reform.<sup>27</sup>

The relationship between the era's dominant domestic relations discourse and marriage law reform was quite clear. The two united to declare that the law ought to assert uniform ideas of legitimate marriages to an increasingly diverse populace. As a result, the law broadcast a more precise and uniform ideological conception of fit marital partners than ever before.<sup>28</sup> Though much of the new code became widely accepted, almost every aspect of it was contested and often with success in many jurisdictions. However, those contests took place within a debate framed by the opposition to diversity.

The tilt toward regulation put defenders of marital freedom on the defensive. Yet, as the balance metaphor suggested, the minority always retained a place in the debate, and their voices were heard. Indeed, many states retained vestiges of the old system. For example, in 1930, twelve states still retained the traditional Anglo-American marriage ages of fourteen for males and twelve for females, and only twelve states required as much as a five-day waiting period between application for a marriage license and performance of the ceremony. Tellingly, the "Marriage and Marriage License Act" proposed by Commissioners on Uniform State Laws in 1907 had only been adopted in Wisconsin and in modified form in Massachusetts by 1930. By 1932, only fourteen states had time limits restricting hasty marriages. Equally important, the courts continued their established policy of refusing to declare marriages void because a statutory rule had been violated.<sup>29</sup> Nor did the changes fostered by the rephrased debate stem the rising divorce rate or eliminate marital experimentation. In fact, one development of the age, the tendency of well-educated women to delay or even forego marriage, was simply beyond the law's reach.<sup>30</sup> Equally significant, between 1870 and 1920, the number of divorces granted nationwide increased fifteen fold. By 1924 one marriage out of every seven ended in divorce. Legal restrictions made little difference when many couples were willing to participate in a charade to meet legal requirements for divorce in order to liberate themselves from unsatisfying marriages.<sup>31</sup> The trend in judicial interpretation, however, was to dilute stringent legal statutes. In 1931, only seven states specifically permitted divorce on the grounds of marital cruelty, but judges in most other jurisdictions broadly interpreted laws permitting divorce on grounds of cruelty to encompass expansive notions of mental cruelty. Such individual and institutional actions expressed a continuing commitment to nuptial freedom and to the recognition of nuptial diversity and

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27. On the relationship between marriage and divorce, see Lenore J. Weitzmann & Ruth B. Dixon, *The Transformation of Marriage Through No-Fault Divorce: The Case of the United States*, in MARRIAGE AND COHABITATION IN CONTEMPORARY SOCIETIES 143 (John M. Eckelart & Sanford N. Katz eds., 1980).

28. On these general changes, see GROSSBERG, *supra* note 6, at chs. 3-4.

29. HALL & BROOKE, *supra* note 18, at 18-21; Joseph H. Beale et al., *Marriage and the Domicil*, 44 HARV. L. REV. 501 (1930-31). See also 1 VERNIER, *supra* note 20, at 15. See generally HALL & RICHMOND, *supra* note 23.

30. See Brady, *supra* note 10, at 105.

31. STEVEN MINTZ & SUSAN KELLOGG, DOMESTIC REVOLUTIONS: A SOCIAL HISTORY OF AMERICAN FAMILY LIFE 109-10 (1988).

functioning marriages. These lay and professional actions kept the law from tilting even more toward restriction.<sup>32</sup>

But those who continued to champion marital freedom also faced sanctions for their deviancy. Two groups incurred formal ostracism as "folk devils"—interracial couples and Mormon polygamists. They became the "Other" of marriage law: persons used in family law debates to define unwanted marital partners and unwanted marriages. Both groups also incurred the greatest state sanctions of the period. Pushed to the margins, their fate illustrates the tenor of marriage law debates in the era.

Bans against interracial marriage proliferated in the South and West and some Midwestern states. From 1880 to 1920, when white racial phobia reached unprecedented heights, twenty states and territories strengthened or added antimiscegenation laws. Moreover, though five states had repealed the ban during the 1880s, none did so from 1890 to 1920.<sup>33</sup> Racism combined with new eugenic fears to support curbs on individual marital choice. The Virginia statute, for example, justified the ban because it "preserved the racial integrity of its citizens" and prevented "the corruption of blood," a "mongrel breed of citizens," and the "obliteration of racial pride."<sup>34</sup> By 1910, Harvard Professor Frederic Stimson declared: "Marriage may be forbidden or declared null between persons of different races, and the tendency to do so is increasing in the South, and is certainly not decreasing in the North. Indeed, constitutional amendments are being adopted and proposed having this in view, 'the purity of the races.'"<sup>35</sup> That same year, in his widely read study of the color line, muckraker Ray Stannard Baker explained the popular prejudices that undergirded the ban: "Although there are no laws in most Northern states against mixed marriages, and although the Negro population has been increasing, the number of marriages is not only not increasing, but in many cities, as in Boston, is decreasing. It is an unpopular institution."<sup>36</sup> Almost two-thirds of the nation codified its unpopularity.

By 1916, twenty-eight states and territories prohibited some form of interracial marriage, creating the most racist nuptial code in American history. And the ban produced the widest number of marital restrictions. Laws protected racial purity by banning the marriage of whites with African-Americans, Asians, and Native Americans. Recognizing the legality, indeed the legitimacy, of interracial unions would, in the view of many white critics, have offered at least tacit support for racial and social equality in domestic relations. As racial segregation became even more inflexible with the appearance of "Jim Crow" laws, marriage was singled out for the most stringent restrictions. More states banned interracial marriage than any other form of racially related conduct. A 1910 study of racial discrimination categorically labeled the ban as the one restriction "which has not been confined to the South, and which has, in a large measure, escaped the adverse criticism heaped upon other race distinctions."<sup>37</sup>

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32. *Id.* at 109-10, 127.

33. 1 VERNIER, *supra* note 20, at 204-09.

34. STIMSON, *supra* note 19, at 313.

35. *Id.*

36. *Quoted in* CHARLES S. MAGNUM, JR., *THE LEGAL STATUS OF THE NEGRO* 99 (1940).

37. GILBERT T. STEPHENSON, *RACE DISTINCTIONS IN AMERICAN LAW* 78 (1910). *See also* FELIX COHEN, *HANDBOOK OF FEDERAL INDIAN LAW* 79 (1942); GROSSBERG, *supra* note 6, at 136-40; Note,

At the same time, the greatest use of federal power in nineteenth century domestic relations law occurred with the campaign to eliminate polygamy among the Mormons, the last major remnant of antebellum utopians like the Shakers and the followers of John Humphrey Noyes who had experimented with marital forms. Polygamy kindled a bitter national debate that tested the legal commitment to monogamy, and family savers responded in kind. Upset at the ineffectiveness of statutory attempts to stifle the practice, President Ulysses S. Grant complained of the failure to destroy what he termed a "remnant of barbarism, repugnant to civilization, to decency, and to the laws of the United States."<sup>38</sup> Congress responded in 1874 with the Poland Act which increased federal control over territorial courts and juries in Utah by limiting the procedural rights of indicted Saints.<sup>39</sup>

The first major legal test of the campaign came four years later in *Reynolds v. United States*.<sup>40</sup> Chief Justice Morrison R. Waite eliminated the one foundation on which an alternative to monogamy might have received constitutional protection: the right to religious liberty. While fully subscribing to the constitutional prohibition on persecuting individuals for their religious beliefs—which he termed "opinion"—Waite ruled that Congress could punish subversive and antisocial "acts." He labeled polygamy "an odious practice" and rejected Reynolds' attempt to have it classified as a constitutionally protected theological belief. The Chief Justice used revealing analogies to make his point and underscore the folk devil status of the Mormons:

Suppose one believed that human sacrifices were a necessary part of religious worship, would it be seriously contended that the civil government under which he lived could not interfere to prevent a sacrifice? Or if a wife religiously believed it was her duty to burn herself upon the funeral pile of her dead husband, would it be beyond the power of the civil government to prevent her carrying her belief into practice?<sup>41</sup>

Waite also relied on the traditional Anglo-American prohibition of bigamy to denounce plural marriage as illegal and un-American. Furthermore, he endorsed a broad definition of state nuptial authority by placing it "within the legitimate scope of the power of every civil government to determine whether polygamy or monogamy shall be the law of social life under its dominion."<sup>42</sup> To permit plural marriage, he concluded, would "make the professed doctrines of religious beliefs superior to the law of the land, and in effect to permit every citizen to become a law unto himself."<sup>43</sup> The court would not accept such an extension of nuptial freedom.

*Reynolds* cleared the way for a renewed assault on the Mormon theocracy. Further congressional legislation, most notably the Edmunds-Tucker Act of 1887, hobbled the Saints by criminalizing cohabitation with more than one woman, banning advocates of

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*Intermarriage with Negroes—A Survey of State Statutes*, 13 VA. L. REG. (n.s.) 311, 311-12 (1927).

38. Quoted in IX A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 4105 (James D. Richardson ed., 1897).

39. Poland Act, ch. 469, § 4, 18 Stat. 253, 254-55 (1874).

40. 98 U.S. 145 (1878).

41. *Id.* at 166.

42. *Id.*

43. *Id.* at 167.

polygamy from juries, authorizing the annulment of the incorporation of the Mormon church and the confiscation of its assets, and imposing test oaths of opposition to polygamy for territorial citizens.<sup>44</sup> Congress rejected attempts at statehood to retain its power over the sect. In 1885, the Supreme Court endorsed much of the legislative assault with the declaration that the cohabitation of a man and more than one woman "is not a lawful substitute for the monogamous family which alone the statute tolerates."<sup>45</sup> By the time this law school was founded, the campaign was at its zenith. Criminal prosecutions of almost 1300 Saints, financial destruction, and promise of continued federal and local assaults overcame the Saints' resistance. The Mormon leadership renounced polygamy, and with a constitutional ban, Utah finally achieved statehood in 1896.

The battle with the Mormons allowed the American legal system to arm itself with unusual power to enforce the majoritarian allegiance to monogamy. In a society increasingly obsessed by fears about family life, polygamy came to be seen as such a monumental menace to the nation's households that it encouraged an unparalleled federal intervention into the internal governance of a territory. Charles S. Zane, who had presided over many polygamy trials as a federal judge, explained why in the 1891 *Forum*: "The immediate effects of the law often appeared very sad, and, to justify it, it was necessary to look away, and ahead to a social system with a family consisting of one husband and one wife and their children, and the affections that arise from such relations."<sup>46</sup>

Women and men who entered interracial and polygamous marriages became the folk devils of marriage reform because they were depicted as the most extreme consequences of marital freedom. As folk devils they were used repeatedly to legitimate the new ideological conception of marriage that tilted the law toward restrictive regulations.

### B. Custody

Domestic relations' dominant discourse also framed debates about custody law during the years surrounding the law school's founding. The moral panic engulfed all discussions of family law, including the rules governing parents and children. Concern about disorder in the nation's families flowed not just from mounting fears about marriage, but also from evidence of high rates of infant mortality as well as child abuse, delinquency, and neglect. And critically, anxiety arose amidst what Viviana Zelizer calls the "sacralization" of children, a view of children emphasizing their economic uselessness and their emotional pricelessness. Child labor, for instance, seemed to violate both childhood innocence and degrade their sentimental worth.<sup>47</sup> Calls for greater regulation

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44. Edmunds-Tucker Act, ch. 397, §§ 1, 2, 26, 24 Stat. 635, 635-41 (1887) (repealed 1978).

45. *Cannon v. United States*, 116 U.S. 55, 72 (1885).

46. Charles S. Zane, *The Death of Polygamy in Utah*, 12 *FORUM* 368, 371 (1891-92). See also GROSSBERG, *supra* note 6, at 120-26; Carol Weisbrod & Pamela Sheingorn, *Reynolds v. United States: Nineteenth Century Forms of Marriage and the Status of Women*, 10 *CONN. L. REV.* 828, 828-58 (1978). For a Mormon view of the conflict, see EDWIN BROWN FIRMAGE & RICHARD COLLIN MANGRUM, *ZION IN THE COURTS: A LEGAL HISTORY OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, 1830-1900*, Pt. II (1988).

47. VIVIANA A. ZELIZER, *PRICING THE PRICELESS CHILD, THE CHANGING SOCIAL VALUE OF CHILDREN* chs. 1-3 (1985).

of parenthood echoed demands for marriage reform. Self-described child-savers heeded those calls. As Brady contends:

Homeless, orphaned, and neglected children caught their attention. Inspired by images of family life gone awry, these reformers joined the temperance movement, campaigned for 'moral purity,' and promoted 'voluntary motherhood.' The drunkard and his family, the seducer of the prostitute, and the parents who sent their children into factories to work all seemed to require government intervention. Some reformers believed that the government should step in to enforce the rights of wives and children and protect them from abuse by husbands and fathers.<sup>48</sup>

Like the marriage crusade, demands for greater policing of the nation's homes found legal translations in calls for rearranging the balance between family autonomy and state regulation. And, a tilt toward greater public regulation expressed a determination to limit family diversity and more precisely define a fit parent. Paternalism became the basic theme in discussions about the law of parent and child. Robert Griswold explains the complications of the era's state paternalism by suggesting that:

Reformers at the turn of the century sought to preserve the family as an economically private unit of breadwinning fathers and home-centered mothers. In short, the image of a state invasion of the family obscures rather than clarifies what took place. The state intervened not to undermine the family, but, rather, to foster its economic independence and its functional interdependence. It could not do so, however, without impinging on the power of *individual* husbands and fathers.<sup>49</sup>

A series of paternalistic laws from bans against children joining the circus to compulsory school laws followed from the determination to impose uniform standards on families.<sup>50</sup>

Child custody became a critical subject in these dialogues. Most critically, the tilt toward paternalism, ironically, helped make maternal preference the dominant public narrative of custody law. The power of maternalism in the period flowed from the reality, as Molly Ladd-Taylor has argued, that motherhood "was a central organizing principle of Progressive-era politics."<sup>51</sup> As she makes clear in a study of welfare reforms of the era such as mothers' pensions:

The persuasive appeal of maternalism as a political movement of Anglo-American women in the Progressive era is precisely what now seems its weaknesses: the presumption of gender difference and the repression of diversity. Despite the differences among them, all maternalists believed that

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48. Brady, *supra* note 10, at 104. For an overview, see SUSAN TIFFIN, *IN WHOSE BEST INTERESTS? CHILD WELFARE REFORM IN THE PROGRESSIVE ERA* (1982).

49. GRISWOLD, *supra* note 10, at 57.

50. For a discussion of the era, see Michael Grossberg, *Children's Legal Rights? A Historical Look at a Continuing Legal Controversy*, in *CHILDREN AT RISK IN AMERICA* 119 (Roberta Wollons ed., 1993).

51. MOLLY LADD-TAYLOR, *MOTHER-WORK: WOMEN, CHILD WELFARE, AND THE STATE, 1890-1930* at 43 (1994).

women were more nurturing and sensitive to children than men and that the welfare of children—and therefore the future of the nation—depended on the preservation of the home. At a time of increasing heterogeneity in family styles and childrearing practices, both sentimental and progressive maternalists clung to a singular conception of family life. Elite white women, who despite their privileges were denied political, economic, and legal rights equal to men of their class, saw in the defense of 'home' and 'motherhood' a promising source of dignity and power.<sup>52</sup>

Maternalism became the watchword of custody law. It forced a rephrasing of the custody law's central doctrine: the best interests of the child rule. A creation of antebellum judges, the doctrine has always been fundamentally indeterminate. It demanded that judicial decisions further a child's best interests. By doing so, it ceded judges wide discretionary power to define those interests and to evaluate parental fitness accordingly. The doctrine turned custody hearings into narrative competitions in which individual mothers, fathers, and guardians told stories that tried to discredit their adversary's parental care while embellishing their own.<sup>53</sup> And it forced judges to balance their conceptions of children's interests with their notions of parental rights and state authority. Maternal preference simplified these contests by providing a new dominant story line. Compelled to accept the reality that some families would not conform to the ideologically preferred household of mother, father, and children, custody law debates focused on family saving through the imposition of maternalist policies on all types of families and the creation of uniform standards of mothering.<sup>54</sup>

Defining parenting ever more precisely as a maternal duty tilted the debate against diversity with a new balance produced by maternal preference. Fathers, of course, felt the brunt of a maternalist definition of the best interests of the child. The longstanding Anglo-American story line that granted fathers superior custody rights succumbed to the new tale as the balance of the law tilted toward uniformity. As Griswold noted, "The language of science and expertise had been appropriated in ways that left fathers ever more irrelevant to the rearing of their own children. Motherhood was increasingly seen as a science, fatherhood a seldom discussed art."<sup>55</sup> By the end of the nineteenth century, mothers received custody in more than ninety percent of contested cases and, most likely, in informal custody arrangements as well.<sup>56</sup> Fathers, whose parental skill and legitimacy had been challenged since the early nineteenth century, had been discredited as child-rearers and reduced in law to a second, and far less preferable, parent. Indeed, single fathers were labeled as deviant. That process occurred most clearly in the skyrocketing

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52. *Id.* at 201. See also THEDA SKOCPOL, *PROTECTING SOLDIERS AND MOTHERS: THE POLITICAL ORIGINS OF THE SOCIAL POLICY IN THE UNITED STATES* Intro., ch. 8 (1992).

53. On trials as narrative competitions, see Lawrence M. Friedman, *Law, Lawyers, and Popular Culture*, 98 YALE L.J. 1559 (1989).

54. MARY ANN MASON, *FROM FATHER'S PROPERTY TO CHILDREN'S RIGHTS: THE HISTORY OF CHILD CUSTODY IN THE UNITED STATES* 118-19 (1994).

55. GRISWOLD, *supra* note 10, at 32.

56. WILLIAM GOODE, *AFTER DIVORCE* 29 (1956).

divorce cases of the era. As divorces escalated at an increasingly rapid rate, maternal custody became a critical family law policy.

Institutionalized through doctrines like the tender years rule, which decreed that infants and young children needed a mother's care and thus custody, maternalism provided the dominant definition of parental fitness in this onslaught of cases. For example, a Wisconsin judge decreed in 1921 that:

For a boy of such tender years nothing can be an adequate substitute for mother love—for that constant ministration required during the period of nurture that only a mother can give because in her alone is duty swallowed up in desire; in her alone is service expressed in terms of love.<sup>57</sup>

An Arkansas case the next year revealed the extent of the judiciary's maternalistic commitments. It dealt with the conduct of Mrs. Crabtree, who had almost murdered her husband by cutting his throat with a razor blade, slicing through his fingers, and stabbing him in the back. Nevertheless, the state supreme court separated spousal and parenting rules to declare, "It does not follow that, because the wife tried to kill him in a fit of anger, she did not have any parental affection for the children. On the contrary, the record discloses that she loved them and was properly caring for them."<sup>58</sup>

Nor was maternal preference merely a judicial creation. Legislators codified the new tilt in custody law. Equal custody and guardianship rights had been a goal of the women's rights movements since the first convention in Seneca Falls in 1848. Yet only in this era did it succeed. By 1936, forty-two states granted mothers equal rights to their minor children. Though most of the acts did not formally adopt maternal preference, by abolishing superior paternal rights and demanding that judges be guided by the best interests of children they ensured that most mothers who conformed to judicial expectations of proper parents received custody. In this way, custody law promoted family uniformity by making mothers the primary parents of the young.<sup>59</sup>

The new tilt in custody law toward maternalism also encouraged judges and legislators to break the age-old Anglo-American bond between maintenance and custody. No longer conceived as mutually dependent rights, support became a separate paternal obligation. Though difficult to collect, the policy was justified by claims that it enhanced the work of mothers while forcing men to do their duty. By the mid-1930s, forty-six states had passed separate laws criminalizing desertion and nonsupport. Twenty of them declared failure to support a misdemeanor, fourteen a felony punishable by a year or more in state prison, and the other states simply labeled nonsupport a crime.<sup>60</sup> Unwed fathers bore much of the brunt of the new policy. Dismissed out of hand as fit parents, their obligations to support increased.<sup>61</sup>

Maternalist custody framed debates about the legitimacy of all functional families in the era, not just households engulfed in custody contests between divorcing or unwed parents. New domestic relations institutions such as juvenile courts and family courts

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57. *Jenkins v. Jenkins*, 181 N.W. 826, 827 (Wis. 1921).

58. *Crabtree v. Crabtree*, 242 S.W. 804, 808 (Ark. 1922).

59. 4 VERNIER, *supra* note 20, at 18.

60. 4 VERNIER, *supra* note 20, at 66-86.

61. MASON, *supra* note 54, at 56.



used custody to impose uniformity on the nation's diverse homes. Child-savers paid particular attention to the offspring of the immigrant and working class. As Herbert Jacob argues:

[A] public law of child welfare became imposed on the poor that brushed only lightly upon intact, mainstream families. These latter were governed by a private family law which less frequently was the object of legislation, but developed instead through private agreements and the decisions of courts in individual divorce cases.<sup>62</sup>

In doing so, domestic relations law reinvigorated what Jacobus ten Broek has called the dual system of family law: liberationist policies for middle and upper classes, and repressive policies for the lower classes and for racial and ethnic groups.<sup>63</sup> In that vein, a Minnesota juvenile court judge declared:

I believe in this kind of court . . . [i]t is to reach the boy and teach him to follow in the correct line . . . and if need be, to take him from an immoral and vicious and criminal environment, *even if it takes him away* from his parents, that he may be saved, even though they may be lost.<sup>64</sup>

As a result, custody law retained its longstanding role as a monitor of families. This made maternal preference a doubled-edged phrase. It brought functioning families headed by mothers greater legal recognition, while simultaneously sanctioning constant monitoring or even removal if those women failed to meet the stringent standards of motherhood. Consequently, as Mary Ann Mason has suggested:

Social reformers affirmed the family as the appropriate vehicle for raising children and assisted some mothers in retaining custody of their children. Yet, child welfare workers, acting as agents of the state, also intervened in families and took away children from parents they considered unfit. It is here that the middle-class American-born orientation of the social reformers was most apparent. There was little tolerance of cultural, ethnic, or class differences, particularly when it came to alcohol or what was considered immoral sexual behavior. Single mothers were the main beneficiaries of social and economic support, but they were also the disproportionate target of social worker intervention and removal of children. In part this was because single mothers, as in previous eras, were still more vulnerable to losing their children because of their inability to support them. But it was also because mothers were held to a high standard of sexual morality and the lives of poor single mothers were clearly exposed to social workers.<sup>65</sup>

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62. HERBERT JACOB, SILENT REVOLUTION: THE TRANSFORMATION OF DIVORCE LAW IN THE UNITED STATES 129-30 (1988).

63. JACOBUS TEN BROEK, FAMILY LAW AND THE POOR: ESSAYS (Joel F. Handler ed., 1971).

64. *Quoted in* DAVID J. ROTHMAN, CONSCIENCE AND CONVENIENCE: THE ASYLUM AND ITS ALTERNATIVES IN PROGRESSIVE AMERICA 223 (1980) (emphasis in original).

65. MASON, *supra* note 54, at 100-01.

In this way, the tilt in custody law made custodial determinations tools to reshape these families as did innovations of the era like mothers' pensions. Where, for example, judges often refused to use sexual improprieties to deny custody to middle class women, poor women and women of color often faced such restrictions. In 1920, for instance, Anola Green, an African-American woman in Washington D.C., could not keep her three children unless she forced her lover to leave.<sup>66</sup> Women like Green became the folk devils of custody law. They were used as examples to proclaim the necessity of uniform conceptions of mothers. In this way, custody law became a way judges and other officials policed family deviancy and tried to limit family diversity. The result was to embed maternalism as the dominant public narrative of custody law and thus broadcast an ideologically defined mother as the law's singular image of a fit parent.<sup>67</sup>

The legal paternalism evident in marriage and custody law was echoed in every branch of family law during these years. It framed the discourse on everything from abortion to juvenile justice. Though resisted, the effect was to tilt the law's balance toward stricter and more restrictive state regulation in an effort to stifle family diversity by denying legal support to many functional families.

## II. FAMILY LAW LIBERATION

Beginning in the twenties and thirties family law debates began to change. As the commitment to family uniformity and extensive state regulation waned, a new concern for individual rights and a new tolerance for family pluralism began to be heard. Most importantly, a growing diversity of family forms challenged the inherited ideological conception of the household that had been embedded in domestic relations laws. In 1991, Steven Mintz reported that "[a]s recently as 1960, 70 percent of all American households consisted of a breadwinner father, a housewife mother, and their children. Today, fewer than 15 percent of American households [fit that pattern]."<sup>68</sup> The rise of egalitarian legal practices and beliefs strengthened calls for change.

The new dialogue provoked questions about the continued legitimacy of the balance in family regulation inherited from the previous era. By the 1950s, numerous attempts had begun to liberate individuals and families from the paternalism of the previous era. They proceeded from new claims voiced in terms of individual rights, autonomy, and equality. Organized in a different fashion than the earlier family saving campaigns and using different tactics, particularly a reliance on litigation, new groups forced a change in family law debates. Indeed, as in the antebellum era, courts became the major forum for debates about family governance.<sup>69</sup>

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66. LINDA GORDON, *HEROES OF THEIR OWN LIVES: THE POLITICS AND HISTORY OF FAMILY VIOLENCE: BOSTON, 1880-1960* at 131-32 (1989).

67. For analyses of these trends, see GROSSBERG, *supra* note 6, at chs. 6-7; MASON, *supra* note 54, at ch. 3.

68. Steven Mintz, *New Rules: Postwar Families*, in *AMERICAN FAMILIES: A RESEARCH GUIDE AND HISTORICAL HANDBOOK* 184 (Joseph M. Hawes & Elizabeth I. Nybakken eds., 1991).

69. For a discussion of the family changes and conflicts of the era, see MINTZ & KELLOGG, *supra* note 31, at chs. 7-10.

As before, the era's domestic relations debates were framed by its dominant discourse. Calls for change became voices arguing that the law's balance had tilted too far the wrong way. Inherited family law rules emphasized restrictive regulation and uniformity, when they ought to promote individual choice and the recognition of a wide array of functioning families. The new debate was fueled as well by the reality that family disputes, especially divorce, now dominated many trial court dockets. By the 1980s, almost half of court business involved domestic relations.<sup>70</sup> Equally distinctive, in a shift from the state and legislative locus of the previous debates, federal appellate courts became central sites for contention and change during the period. In a series of dramatic decisions, federal judges revised the discourse of domestic relations by expanding the law's definition of a family.

Cases like *Moore v. East Cleveland*<sup>71</sup> became emblematic of the shifting balance in domestic relations prompted by a new acceptance of functioning families. In *Moore*, the Supreme Court granted legal recognition to a functioning family of grandparents and children denied family status by local zoning rules that reserved the area for single families. Ironically, though suggestively, the Court vindicated functioning families in a case that arose right next-door to site of the suit in which it legitimated zoning, *Euclid v. Ambler Realty Co.*<sup>72</sup> Now the Court asserted: "Ours is by no means a tradition limited to . . . the nuclear family. The tradition of uncles, aunts, cousins, and especially grandparents sharing a household along with parents and children has roots equally venerable and equally deserving of constitutional recognition."<sup>73</sup> That had been true too earlier, but the reality of family diversity had been ignored in an attempt to implement the previous public narrative by demanding that single families be the proscribed form of household. Now the new story-line of family law forced a reconsideration of such judgments. Decisions like *Moore* challenged restrictive conceptions of the family promulgated in the previous era, and thus helped tilt the discussion of family law away from state regulation by valorizing individual choice and family diversity.<sup>74</sup>

#### A. Marriage

Changes in marriage law are apt illustrations of the liberationist tilt in domestic relations discourse that upset the marriage law balance to create a new era in American family law. As Marjorie Maguire Schultz argued in 1982, the law during recent decades "has evolved far toward recognizing the need for private choice and the untenableness of uniform public policy as a strategy for governing the conduct and obligations of intimacy."<sup>75</sup> Though many of the restrictions imposed earlier in the century had become accepted as commonplace, such as licenses and blood tests, others continued to provoke controversy over the legitimate role of the state in regulating marriage.

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70. MINTZ & KELLOGG, *supra* note 31, at 228.

71. 431 U.S. 494 (1977).

72. 272 U.S. 365, 388 (1926).

73. *Moore*, 431 U.S. at 504.

74. See generally EVA R. RUBIN, THE SUPREME COURT AND THE AMERICAN FAMILY: IDEOLOGY AND ISSUES ch. 7 (1977).

75. Marjorie M. Shultz, *Contractual Ordering of Marriage: A New Model for State Policy*, 70 CAL. L. REV. 207, 291 (1982).

The most contentious initial issue of the era was the continued ban on interracial marriages. Like other racist relics of "Jim Crow" America, it became a target of the egalitarian civil rights movements. Several states repealed the ban in the 1940s and 1950s, and then in 1967 the Supreme Court declared the restriction unconstitutional. *Loving v. Virginia*<sup>76</sup> gave marital freedom constitutional sanction. Calling matrimony one of the "basic civil rights of man," the justices tilted the law's balance against regulation by holding that unwarranted nuptial restrictions violated the principle of equality in the Fourteenth Amendment and thus deprived citizens of liberty without due process of law.<sup>77</sup> And they were quite willing to offer an expansive definition of such unwarranted curbs.<sup>78</sup> Justice William O. Douglas argued that "[t]he Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discriminations . . . . [T]he freedom to marry, or not to marry, a person of another race resides with the individual and cannot be infringed by the State."<sup>79</sup> Folk devils had become rhetorical exemplars of rights holders.

*Loving* had significance far beyond the issue of racial restrictions on nuptial freedom. It occupied a similar substantive and symbolic place in this era that *Maynard v. Hill*<sup>80</sup> had filled in the previous one. *Loving* voiced the new tilt toward contractual freedom that came to dominate all debates about marriage law. In 1983, Weyrauch and Katz captured the tenor of this shift when they argued that:

The importance of *Loving* should not, however, be seen in its ability to support a winning argument in court. In our view, its function is to signal potential changes in the law of marriage. These changes favor the increased autonomy of the parties and the decline of State involvement in marriage.<sup>81</sup>

Yet they also suggested that *Maynard* and *Loving* formed alternative dialects of nuptial law that existed for those who would dispute the role of the state in governance of marital relations:

In other words, the power of the State to regulate marriage, following *Maynard*, is likely to be strictly construed and not necessarily extended to cover nonmarital cohabitation. If formal and informal marriage are viewed as being functionally related, the permissive message of *Loving* seems to prevail over restrictive State regulation insofar as informal marriage is concerned.<sup>82</sup>

The increased recognition for functional marriages made possible by the new balance in the law was evident in cases like *Zablocki v. Redhail*.<sup>83</sup> In that decision, the Supreme

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76. 388 U.S. 1 (1966).

77. *Id.* at 12.

78. For a useful discussion of this point, see Stephen J. Morse, *Family Law in Transition: From Traditional Families to Individual Liberty*, in CHANGING IMAGES OF THE FAMILY 332-33 (Virginia Tuftes & Barbara Myerhoff eds., 1979).

79. *Loving*, 388 U.S. at 12 (Douglas, J., concurring).

80. 125 U.S. 190 (1888). See *supra* notes 15-17 and accompanying text.

81. WEYRAUCH & KATZ, *supra* note 17, at 233.

82. WEYRAUCH & KATZ, *supra* note 17, at 233-34.

83. 434 U.S. 374 (1978).

Court struck down a Wisconsin law that denied marital rights to those with existing child support debts.<sup>84</sup> The statute was a vivid example of the dual system of family law's continued hold on nuptial regulation as well as its tendency to tilt the regulatory balance toward marital restrictions. Conversely, its rejection by the Court exemplified the rippling consequences of labeling marriage a fundamental right. Indeed, Justice John Paul Stevens voiced the contemporary opposition to class distinctions in a concurring opinion. He dismissed the Wisconsin statute because it sanctioned the policy declaration that "the rich may marry and the poor may not. This type of statutory discrimination is, I believe, totally unprecedented, as well as inconsistent with our tradition of administering justice equally to the rich and to the poor."<sup>85</sup> Though precisely such a dual system had long been sanctioned by family law, Stevens' denunciation aptly captured the new marital balance. As he concluded, "[e]ven assuming that the right to marry may sometimes be denied on economic grounds, this clumsy and deliberate legislative discrimination between the rich and the poor is irrational in so many ways that it cannot withstand scrutiny under the Equal Protection Clause of the Fourteenth Amendment."<sup>86</sup> In a 1979 article on family law in transition, Stephen J. Morse expressed the priorities sanctioned by the marriage law discourse created by decisions like *Zablocki*: "Although 'mismatches' and their consequences interfere with the goals of traditional family life and are costly to society, these are costs that should be borne because freedom to marry the person of one's choice is too precious to abandon."<sup>87</sup> Such sentiments, Milton Regan concluded fifteen years later, meant that although "the Court has been careful to proclaim the validity of reasonable regulations that do not significantly interfere with the marriage decision, the clear message is that individual choice regarding marriage is an exercise of personal autonomy to which the state should defer in most cases."<sup>88</sup>

The new tilt in marriage law had a corrosive effect on all nuptial restrictions as it reframed debate to give the highest priority to marital choice. The marital hurdles set up to save the family by the previous generation of domestic relations law reformers began to be knocked over. Both judges and legislators curtailed their roles as nuptial regulators. As Weyrauch and Katz noted:

The capacity to marry has been substantially broadened, even at the risk of greater expenditure of tax funds. Age requirements have been lowered. Mental competence to marry is assumed, not only in the young, but also in the mentally retarded, infirm, and senile. For some relationships and some purposes, incest taboos appear less serious than a generation ago because procreation is no longer always a primary concern of marriage.<sup>89</sup>

Other restrictions on marriage also felt the consequences of the new legal balance as even bans on prisoner marriages fell off the scales. And, resurrecting the dominant judicial

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84. *Id.* at 377.

85. *Id.* at 404 (footnotes omitted).

86. *Id.* at 406 (footnotes omitted).

87. Morse, *supra* note 78, at 333.

88. MILTON C. REGAN, JR., *FAMILY LAW AND THE PURSUIT OF INTIMACY* 37 (1993).

89. WEYRAUCH & KATZ, *supra* note 17, at 352.

policy of the antebellum era, “[r]equirements for marriage that appear on the books are held to be directory only, addressed to state authorities. Violations that would have voided marriages in the past are no longer seen as affecting the essence of the relationship.”<sup>90</sup> Clearly marriage law discourse had a new dominant dialect. It legitimated the removal of what had come to be considered unreasonable burdens on the decision of individuals to marry. The major consequence of this liberationist tilt, Regan maintains, is that it helped create the era’s “greater receptivity to private ordering of family matters.”<sup>91</sup>

The convergence of the judicial designation of marriage as a basic civil right and the legislative retreat from nuptial regulation found a clear and telling expression in the uniform statute movement. Since its creation late in the nineteenth century, the drive for voluntary legal uniformity through state acceptance of model statutes had been a telling indicator of baseline sentiments in the law. This era was no exception. The Uniform Marriage and Divorce Act of 1970<sup>92</sup> eliminated many of the nuptial curbs created in the previous era such as restrictions on the remarriage rights of the guilty party in a divorce. In their place, it set only minimal formalities for marriage ceremonies, and even questioned the utility and desirability of premarital medical examinations. The model statute also urged that marriages entered into in violation of its requirements be considered valid unless formally declared void. The import of the act was to suggest that the state role in matrimony be one primarily of licensing and regulation, not restriction and monitoring as it had been promulgated in the previous period’s uniform marriage laws.<sup>93</sup>

The shifting emphasis of marriage law occurred in an era of marital experimentation reminiscent of antebellum America. As Mintz discovered in 1991, “the number of unmarried couples cohabiting climbed steeply. Since 1960, the number of unmarried couples living together has quadrupled.”<sup>94</sup> This proliferation offered clear evidence of the continuing popular conviction that legitimate unions could and should exist outside the established bounds of marriage law. And as in that previous period, a tendency to confer legal status on a variety of marital arrangements followed from debates that talked of marriage as more of a private than a public issue. Toleration increased accordingly and thus fundamentally rephrased the debate over functional marriages.

As a result of the interaction between popular behavior and liberationist legal developments, informal unions once again tested both the legitimacy and the extent of marital regulation. Indeed, in yet another development that echoed without replicating the era in which common law marriage had been created, courts began to increase the responsibilities of partners in informal yet functioning marriage-like unions. Taking the lead in this as in so many issues of the era, judges did so by enforcing oral contracts and implied contracts between couples cohabiting outside of marriage. As Regan noted:

Receptivity to private ordering of the terms of family life is underscored by greater willingness of courts to enforce marital contracts. Courts traditionally were reluctant to enforce most antenuptial agreements between spouses for fear

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90. WEYRAUCH & KATZ, *supra* note 17, at 352.

91. REGAN, *supra* note 88, at 36.

92. 9A U.L.A. 147 (1993).

93. For a discussion of the Act, see JACOB, *supra* note 62, at ch. 5.

94. Mintz, *supra* note 68, at 185.

that they might alter the 'essential incidents' of marriage or that provision for property division or support upon divorce might encourage marital dissolution. With the decline of consensus about the terms of marriage, and with the prevalence of divorce, most states have adopted the view that it is unreasonable to regard marital contracts as contrary to public policy.<sup>95</sup>

Palimony cases like *Marvin v. Marvin*<sup>96</sup> illustrate the shifting balance in the law that produced the inclination to grant legal status to voluntary assumed marital forms despite the legal tradition of not enforcing contracts founded upon illegal or immoral consideration. In supporting Michelle Marvin's claim for economic benefits from her relationship, the California Supreme Court decided that when couples living together out-of-wedlock break up, the parties may be entitled to a legally enforceable dissolution of their property depending on their agreements and expectations concerning their relationship and property.<sup>97</sup> Conversely, they rejected Lee Marvin's attempt to invalidate the relationship as an immoral exchange of support for sex: "The fact that a man and a woman live together without marriage . . . does not in itself invalidate agreements between them relating to their earnings, property, or expenses."<sup>98</sup> Nor did the court accept arguments that upholding Michelle's claim would undermine matrimony itself. Though such arguments had been persuasive in the previous era, now the judges voiced the conviction that:

[T]he prevalence of nonmarital relationships in modern society and the social acceptance of them, marks this as a time when our courts should by no means apply the doctrine of the unlawfulness of the so-called meretricious relationship to the instant case. As we have explained, the nonenforceability of agreements expressly providing for meretricious conduct rested upon the fact that such conduct, as the word suggests, pertained to and encompassed prostitution. To equate the nonmarital relationship of today to such a subject matter is to do violence to an accepted and wholly different practice.<sup>99</sup>

The decision, as Morse suggests, epitomized the tendencies of the era's marriage law to both sanction individual choice and hold individuals accountable for their choices:

In sum, couples living together could obtain all the economic benefits and consequences (in California) of marriage simply by agreeing to do so, and courts would enforce the contract. This decision gave couples living together more freedom to arrange their economic affairs than is usually given to married couples.

*Marvin* was a revolutionary case because it treated some couples living together much as if they were married, a result previously achieved only by

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95. REGAN, *supra* note 88, at 37.

96. 557 P.2d 106 (Cal. 1976).

97. *Id.* at 122-23.

98. *Id.* at 113.

99. *Id.* at 122.

common law marriage, a disfavored institution that had been abolished in California.<sup>100</sup>

Through decisions like *Marvin v. Marvin*,<sup>101</sup> the contractualism that had previously undergirded common law marriage had a second legal life as did its functional definition of marriage. And it was broadcast throughout the nation by another model statute, the Uniform Premarital Agreement Act<sup>102</sup> drafted in 1983. The Act advised that premarital contracts should be considered unenforceable only if one of the parties entered the relationship involuntarily, if the contract was unconscionable, or if there had been inadequate disclosure.<sup>103</sup> Debate over the legalization of cohabitation demonstrated not only the era's domestic relations tilt but also the continued existence of the law's balancing act. As Lenore Weitzman commented, "opponents of intimate contracts regard marriage primarily as a public institution, while proponents view it as a private relationship."<sup>104</sup> During this era, unlike the previous one, proponents had the rhetorical edge.

Finally, as it always had in the past, divorce once again had helped define the discourse of marriage law. Changes in divorce law sprang from the same tilt toward individual choice and private ordering that dominated marriage law. And in divorce too, the regulatory deterrents created earlier in the century became the prime targets for change. Restrictions on divorce and even more tellingly, the very notion of fault as the prime issue in dissolving a marriage lost their authority as the legal balance tilted away from public regulation. Finally, as in the case of marriage law, changes in divorce law proceeded in a reciprocal way with broader social changes. Prime among these were both the escalating rate of divorce and the declining stigmatization of the divorced. By 1991, the number of divorces was "twice as high as in 1966 and three times higher than in 1950."<sup>105</sup>

The most dramatic and telling change began in 1970 when California adopted no-fault divorce. The legislature shifted the emphasis from public regulation to individual choice by eliminating the need for couples to prove the commission of a marital crime in order to dissolve a marriage. The innovation spread rapidly through the nation. Between 1970 and 1975 all but five states adopted some form of no-fault divorce; and by the early 1990s South Dakota remained the only hold-out. The shift allowed couples throughout the republic to dissolve their union by claiming incompatibility, irretrievable breakdown, or similar justifications. Indeed, not only were specific grounds for divorce eliminated but a marriage could even be terminated by one spouse without the consent of the other. The substitution of "dissolution" for "divorce" revealed the tilt away from fault and guilt.<sup>106</sup> After surveying the consequences of the rapid triumph of no-fault, Regan

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100. Morse, *supra* note 78, at 354.

101. 557 P.2d 106 (Cal. 1976).

102. 9B U.L.A. 369 (1983).

103. *Id.* at 376.

104. LENORE J. WEITZMAN, *THE MARRIAGE CONTRACT: SPOUSES, LOVERS, AND THE LAW* 231 (1980).

105. Mintz, *supra* note 68, at 184.

106. Mintz, *supra* note 68, at 191. See also JACOB, *supra* note 62, at ch. 4; RODERICK PHILLIPS, *PUTTING ASUNDER: A HISTORY OF DIVORCE IN WESTERN SOCIETY* 619-34 (1988).



explained its larger implications for the on-going debate about the proper balance in family law:

The conceptualization of marriage as a private matter is underscored by the trend to disregard or define very narrowly marital fault in determinations concerning property division, alimony, and custody. Such a posture reflects the view that there is little if any social consensus about standards that should govern marital behavior, and that states should refrain from passing judgment on the substance of marital interaction unless some direct harm can be demonstrated. The connection between this agnosticism about marital behavior and no-fault divorce is apparent: if the state feels less able to assess the propriety of behavior in an existing marriage, then it is in a poor position to proclaim what behavior justifies ending the marriage.<sup>107</sup>

Equally telling, divorce reform included its own assault on family law's dual system. *Boddie v. Connecticut*<sup>108</sup> helped define marriage as a constitutionally protected right by striking down a mandatory filing fee for divorce. The Supreme Court ruled that the fee violated the due process rights of impoverished but estranged couples.<sup>109</sup> It did so by labeling divorce the "adjustment of a fundamental human relationship"<sup>110</sup> and the method by which "two consenting adults may divorce and mutually liberate themselves from the constraints of legal obligations that go with marriage, and more fundamentally the prohibition against remarriage."<sup>111</sup>

As a result of the tilt toward individual choice in debates over marriage and divorce, those who argued for significant public controls on matrimony became less and less persuasive. Instead of broadcasting a uniform image of fit marital partners or even of marriage itself, family law framed the issue as fundamentally an individual decision likely, and legitimately, to produce a wide variety of answers.

### B. Custody

Custody law also underwent a fundamental rephrasing as a result of the shifts in domestic relations discourse. Amidst broad changes in gender roles and beliefs, parenthood once again became a hotly contested issue in domestic relations. Converging trends sparked debate. Particularly visible was the rapid increase of married women in the workforce. Herbert Jacob has chronicled the magnitude of the change:

During the first half of the century, most married women stayed at home; in 1900, only 5.6% of those married worked outside the home; by 1940 that had risen only to 13.8%. Thereafter, however, labor market participation of married women exploded with a rise of ten percentage points every decade. By 1985,

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107. REGAN, *supra* note 88, at 39.

108. 401 U.S. 371 (1971).

109. *Id.* at 374.

110. *Id.* at 383.

111. *Id.* at 376.

54.3% of all married women were in the labor force. Indeed, by 1985 a majority of married mothers with infants under three years old were working.<sup>112</sup>

Such developments provided women with alternative forms of economic security to marriage and fed growing debates about gender roles. And so did a newly reconstituted feminist movement. Most importantly, feminist demands for gender equity and greater male family responsibility challenged the maternalist legacy of the previous era and its inscription in all branches of family law. At the same time, the place of children in law also sparked controversy. Amidst ever escalating divorce rates, approximately one-third of the children born in the era would experience a custody determination as well as the proliferation of family forms. Indeed, the trend was so pronounced, Mary Ann Mason discovered, that a "child born in 1990 had about a fifty percent chance of falling under the jurisdiction of a court in a case involving where and with whom the child would live."<sup>113</sup>

Simultaneously, new ideas about children, especially a growing conviction that children had their own liberty interests separate from parents, also emerged to challenge the inherited balance in custody law, as did an equally pronounced tendency for the state to intervene and remove children from families. Finally, ideological and technological change created a bewildering combination of possible parents: genetic parents, social parents, and a gestational parent.<sup>114</sup> Writing in 1979, Morse surveyed these developments and concluded that "the liberty and autonomy interests of women and children have been recognized and furthered and the costs of family life have been exposed. Together these movements have fostered the dominant modern shift in family law—increasing autonomy for family members in relation to one another."<sup>115</sup>

In custody law, maternalism as the singular definition of parenting became the initial focal point of growing and intense debate about the proper balance between public and individual interests in child rearing. As a result, the presumed superior ability of mothers to raise children that undergirded custody law faced growing challenges as did the concomitant assumption of a uniform definition of a fit parent that maternalism had provided.<sup>116</sup> Instead, diversity gained new legitimacy and functioning families new legal support. All of this made custody one of the most dramatic and contentious legal issues of the era.

By 1970, maternal preference had become the prime casualty of the shifting balance in custody law. It had ceased to provide the dominant public narrative of custody law. State legislatures and the courts rephrased custody law by abandoning maternal preference. For example, between 1960 and 1990 nearly all states either eliminated the tender years doctrine or reduced its significance in custody determinations.<sup>117</sup> Similarly, the Uniform Marriage and Divorce Act attacked one of the major props of maternal

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112. JACOB, *supra* note 62, at 17-18.

113. MASON, *supra* note 54, at 121.

114. Barbara Bennett Woodhouse, *Hatching the Egg: A Child-Centered Perspective on Parents' Rights*, 175 CAL. REV. L. & WOMEN'S STUD. 1758 (1993).

115. Morse, *supra* note 78, at 321.

116. For a discussion of these trends, see Mary Becker, *Maternal Feelings: Myth, Taboo, and Child Custody*, 1 S. CAL. REV. L. & WOMEN'S STUD. 133 (1992).

117. MASON, *supra* note 54, at 123.

preference, the use of marital fault in custody awards. It urged states to adopt codes that distinguished between spousal conduct and parenting rights by suggesting the admonition that the "court shall not consider conduct of a proposed custodian that does not affect his relationship to the child."<sup>118</sup> And the Uniform Parentage Act<sup>119</sup> recommended the equal balancing of the claims of fathers and mothers.

Judges and legislators sought a replacement for maternal preference through a re-invocation of the now long-lived, ever mutable best interests of the child doctrine. The doctrine's indeterminate meaning framed a search for a new balance in custody law that opened the way for greater recognition of functioning families in ways that paralleled the debate over the recognition of functioning marriages. At the same time, eliminating maternal preference reopened the question of what constituted a legally fit parent. In doing so, it also revealed that parenthood had no transcendent meaning, but was always socially constructed during particular moments in time. The resulting debate, which carries into our time, had numerous consequences.

One of its most immediate consequences was to give fathers new legal standing by legitimating rhetorical arguments of equal parenting ability regardless of gender. For example, in 1973 a New York appellate court explicitly rejected the gender assumptions of the previous era when it declared: "The simple fact of being a mother does not, by itself, indicate a capacity or willingness to render a quality of care different from that which the father can provide."<sup>120</sup> Instead, the judges offered a new set of assumptions by asserting that scientific studies showed that "the essential experience for the child is that of mothering—the warmth, consistency and continuity of the relationship rather than the sex of the individual who is performing the mothering function."<sup>121</sup> Conversely, women faced new tests of their parenting skills in rephrased narrative battles that gave credence to judicial biases about working women and female sexuality. An Illinois judge asserted, for instance, that the tender years' doctrine has no application if the mother is working and not in the home full time.<sup>122</sup> Similarly, a Missouri appellate court contended that "if the mother goes and returns as wage earner like the father, she has no more part in the responsibility [of child care] than he."<sup>123</sup> And judges criticized the ability of working women to care for their children. The result was to throw the gender balance in custody into doubt and to rearrange the dynamics of divorce.<sup>124</sup>

Calls for a new definition of a fit parent rearranged the balance of power in disputed custody cases. Even though mothers still tended to request custody most of the time and succeeded in obtaining custody in upwards of ninety percent of all cases, their success rate declined as more and more fathers demanded custody. Although most fathers did not request custody, those that did had greater and greater success. Studies reported success

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118. UNIF. MARRIAGE AND DIVORCE ACT, § 402, 9A U.L.A. 147, 561 (1987).

119. 9B U.L.A. 287 (1994).

120. *State ex rel. Watts v. Watts*, 350 N.Y.S. 2d 285, 289 (1973).

121. *Id.* at 290.

122. *In re Stevens*, 538 N.E.2d 1279, 1281-82 (Ill. App. 1989).

123. GRISWOLD, *supra* note 10, at 264.

124. *See, e.g.,* LENORE J. WEITZMAN, *THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA* (1985).

rates of fathers that ranged from forty percent to sixty percent. The sources of those victories, Mason argues, lay in the era's shifting gender balance of power:

[W]hile only a small percentage of custody disputes reached trial and were decided by a judge rather than the parties, the fact that judges were more willing to look favorably upon fathers' appeals for custody influenced the private bargaining process. Some fathers who may have had no real desire for custody, threatened mothers with the possible loss of custody under the new rules in order to secure advantages in property division, spousal support, and child support. On the other hand, fathers who did want more time with the children could use the law to bargain for greater access.<sup>125</sup>

In this way, the rearranged balance of gender power in custody law sanctioned parental diversity while also securing a primary goal of the nascent fathers' rights movement: to "overcome the decades-old assumption that mothers were the more capable parent and to insist that fathers be assured continued involvement in the lives of their children."<sup>126</sup>

The most significant consequence of this new commitment to gender equity among divorcing parents was the creation and rapid diffusion of joint-custody. Once again California became the era's major family law innovator when it adopted joint custody in 1979. However, unlike the state's other major domestic relations innovation, no-fault divorce,

[Joint-custody] was a change that did not mirror existing practice. It was an invention that went counter to prevailing assumptions about proper child custody decisions. Unlike no-fault, it was not conceived in response to technical problems in the legal system and it was not a product of legal experts. Rather, it reflected the changing life-styles of middle-class American families and a nascent demand by fathers for greater consideration.<sup>127</sup>

On the contrary, legislators explicitly rejected the once dominant view, advanced most influentially by Goldstein, Freud, and Solnit in *Beyond the Best Interests of the Child*, that children involved in parental separations needed the stability that only a permanently designated single custodial parent could provide.<sup>128</sup> Instead, following arguments like the anthropological analysis of Carol Stack that children could and had thrived within multiple family forms, lawmakers endorsed the idea of divorced parents sharing the custody of their offspring.<sup>129</sup> Joint custody also allowed legislators and judges to avoid the newly difficult problem of choosing between mothers and fathers, as New York judge Felicia K. Shea admitted: "Joint custody is an appealing concept. It permits the Court to escape an agonizing choice, to keep from wounding the self-esteem of either parent and to avoid the appearance of discrimination between the sexes."<sup>130</sup> The new custody

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125. MASON, *supra* note 54, at 129.

126. GRISWOLD, *supra* note 10, at 261.

127. JACOB, *supra* note 62, at 133-34.

128. JOSEPH GOLDSTEIN ET AL., *BEYOND THE BEST INTERESTS OF THE CHILD* (1973).

129. Carol B. Stack, *Who Owns the Child? Divorce and Child Custody Decisions in Middle-Class Families*, 23 SOC. PROBS. 505-15 (1976). See also JACOB, *supra* note 62, at 133-42.

130. *Dodd v. Dodd*, 403 N.Y.S.2d 401, 401 (N.Y. Sup. Ct. 1978).

creation also rested on the assumption that divorced parents could and would share equally the legal rights and responsibilities of parenthood. By 1990, thirty-six states had followed California's lead and authorized some form of joint custody as well as declaring a preference for its use.<sup>131</sup> Joint custody replaced maternal preference as the seemingly natural and logical operating assumption as well as the rhetorical ideal of custody law.<sup>132</sup>

The debate over the proper balance in custody law between parental rights and state interests extended beyond disputes involving divorcing mothers and fathers. The demise of maternal preference as the public narrative custody law encouraged challenges to all established conceptions of parental fitness and rights. The resulting willingness to consider the legitimacy of functioning families created without benefit of marriage renewed the longstanding debate over the rights and duties of unwed parents. And, as Karen Czapanskiy has observed, in this period, like those of the past, "[h]ow the law regards men and women as parents is displayed with clarity in the legal relationship of unwed parents and their children."<sup>133</sup>

Unwed fathers were the main beneficiaries of the new tilt in custody law. Increasing regard for unwed fathers' custody rights expressed the new status of fatherhood and its underlying assumption that children need a paternal presence in their lives. It also, as Mason determined, "reflected the shifting balance toward fathers and the emphasis on biological parenthood that characterized other aspects of custody law reform."<sup>134</sup> As in other critical family law debates of the era, the Supreme Court helped frame the debate. In the 1972 case of *Stanley v. Illinois*,<sup>135</sup> unwed fathers received custody rights if proven fit parents. Joan Stanley and Peter Stanley had formed a functioning family. They lived together with their three children intermittently for eighteen years. Peter challenged the constitutionality of an Illinois statute mandating that children of unwed fathers became wards of the court upon the death of the mother. He argued that the policy violated his equal protection rights by treating him differently than married fathers, who were presumed to be fit custodians under Illinois law whether they were divorced, separated, or widowed. The Supreme Court supported him and ordered that fitness hearings to determine custody must be held for unwed fathers as for all natural parents in this circumstance.<sup>136</sup> Justice Byron White declared: "The private interest here, that of a man in the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection."<sup>137</sup>

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131. MASON, *supra* note 54, at 131.

132. Joint custody's only significant competitor was another creation of the era, the primary caretaker preference. The gender neutral rule awarded custody to a parent based on a quantitative assessment of the time spent caring for a child. But it was adopted only in West Virginia and Minnesota. For a discussion of the concept, see David Chambers, *Rethinking the Substantive Rule for Custody Disputes in Divorce*, 83 MICH. L. REV. 477 (1984).

133. Karen Czapanskiy, *Volunteers and Draftees: The Struggle for Parental Equality*, 38 UCLA L. REV. 1415, 1417 (1991).

134. MASON, *supra* note 54, at 145.

135. 405 U.S. 645 (1972).

136. *Id.* at 658.

137. *Id.* at 651.

However, debate about the proper balance of rights for unwed fathers also focused on the reality that most of these men did not live with their children and had little or no contact with them. The issue arose with particular urgency in challenges to adoptions by unwed fathers. Once more the Supreme Court supplied a critical answer. It did so when a father who had never lived with his two year old daughter or her mother protested the girl's adoption. He argued that failure to notify him of the proceedings so that he could protest the termination of his parental rights denied him equal protection. The Court disagreed. In explaining why, Justice John Paul Stevens offered a fulsome conception of the ideal of functioning parenting being embedded in custody law:

The significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring. If he grasps that opportunity and accepts some measure of responsibility for the child's future, he may enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child's development. If he fails to do so, the Federal Constitution will not automatically compel a State to listen to his opinion of where the child's best interests lie.<sup>138</sup>

Applying such a standard, the courts created a new balance that tilted the rights of unwed fathers toward those of married men. In doing so, Mary Ann Glendon argues, such a rephrasing of the law became one more instance of a larger development of the era: "[T]he traditionally central position of legal marriage in family law has been extensively eroded everywhere."<sup>139</sup> As a result, unwed fathers who demonstrated a willingness to act as parents could secure greater rights to visitation, consent to adoption, and inheritance along with their longstanding duty of support. The shift in legal rights represented a significant new balance in the law and increase in the parental authority of unwed fathers.<sup>140</sup> However, full equalization of all biological fathers' custody rights did not occur. Despite the new legal balance, a boundary line continued to separate the rights of married and unmarried fathers.<sup>141</sup>

Equally important, gender distinctions remained critical to debates over the rights of unwed parents as they did to all family law discourse. Indeed, the demise of maternal preference and significant increases in the numbers of single mothers during the era made single mothers a new concern. And as a result of the new balance in the law, unwed mothers lost a portion of their custody rights to unwed fathers who demonstrated some parental concern. Nevertheless, as Czapanskiy makes clear, in this, as in other areas of custody law, the rhetoric of gender equity often camouflaged the reality that mothers remained the primary parent and retained major parenting responsibilities:

Unlike the nineteenth century award of custody to unwed mothers, the late twentieth century award of custody rights to unwed fathers has not been

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138. *Lehr v. Robertson*, 463 U.S. 248, 262 (1983).

139. MARY ANN GLENDON, *THE TRANSFORMATION OF FAMILY LAW: STATE, LAW, AND FAMILY IN THE UNITED STATES AND WESTERN EUROPE* 284 (1989).

140. For general discussions of these trends, see GRISWOLD, *supra* note 10, at 239-42; MASON, *supra* note 54, at 145-48.

141. See, e.g., *Michael H. v. Gerald D.*, 491 U.S. 110 (1989).

accompanied by a wholesale change in the duties of fathers to provide the child with a name or with inheritance rights. While some changes have occurred, they are only piecemeal. Most often, the changes have been efforts to equalize the status of illegitimate and legitimate children, not to equalize the responsibilities borne by mothers and fathers of illegitimates.<sup>142</sup>

Instead of actual custody, questions of paternal support dominated debates about the relationship between unwed parents.

The renewed debate over the proper balance in custody law also grew to include direct clashes between parents and the state. Both the demise of maternal preference and the growth of the American variant of the welfare state undermined the anti-institutionalism and aversion to removing children from their homes that had characterized the previous period. According to Mason:

The delicate balance between the state as child protector and the privacy rights of parents to the custody and control of their children definitely tilted toward the authority of the state. The state intervened in families at a rate unknown in history, providing a wide variety of support and sometimes removing the children when the support could not, in the state's opinion, cure the families' problems. The publicly supported child protection agencies still enjoyed some state and even local autonomy, but the trend favored ever more federal government control. Federal control was exacted by U.S. Supreme Court decisions governing procedure in the removal of children from their homes and termination of parental rights, and by federal statutes exacting uniform requirements in exchange for federal funds.<sup>143</sup>

Neglect and abuse became the principal grounds for removal. The upsurge led to redefinitions of the relationship between parental rights and child need.

The vagaries of that relationship in an age that constantly questioned uniform ideas of parental fitness became evident in yet another seminal Supreme Court custody discussion. After several attempts to protect their rights, John and Annie Santosky finally reached the high court. A New York social agency had removed three of their children after charging the couple with neglect. The Santoskys then resisted a petition to terminate their parental rights. After losing in the New York courts, they found relief in Washington. In *Santosky v. Kramer*,<sup>144</sup> the Court ruled that the rights of natural parents could only be terminated upon clear and convincing evidence of parental neglect.<sup>145</sup> Justice Harry A. Blackmun insisted that the fundamental liberty interest of natural parents in the care, custody, and management of their child meant that the procedures affecting termination of parental rights must be fair and that proof must be clear and convincing:

Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life. If anything, persons faced with forced dissolution of their parental rights have a more critical need

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142. Czapanskiy, *supra* note 133, at 1425.

143. MASON, *supra* note 54, at 150.

144. 455 U.S. 745 (1982).

145. *Id.* at 747-48.

for procedural protections than do those resisting state intervention into ongoing family affairs. When the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures.<sup>146</sup>

Such rulings did not guarantee parental custody rights so much as create the framework for balancing the clashing claims of families and welfare agencies. And the best interests of the child doctrine framed the subsequent debates by posing the issue as one of balancing tests between individual and public interests and of the legitimacy of various family forms and conduct.

Even the age-old commitment of custody law to biological ties faced new challenges. The most dramatic came from incredible developments in reproductive technology that enabled people who could not otherwise have babies to have them. The new artificial birth procedures included *in vitro* fertilization, artificial insemination, ovum donation, embryo freezing for future use, embryo transfer, and surrogate mothering. And the results were equally startling. Between 1981 and 1987, about eight hundred test-tube babies were born in the United States; and by 1987 about six hundred children had been born to surrogate mothers. Significantly, five of those surrogate mothers had refused to surrender custody.<sup>147</sup>

In 1986, a bitter New Jersey custody battle broke out when one of those surrogate mothers, Mary Beth Whitehead, refused to deliver her infant daughter to its biological father, William Stern. Under their agreement, Whitehead was artificially impregnated by Stern, and she carried their child to term. The legality and enforceability of surrogate motherhood contracts became the primary issue in the case as did the right of the surrogate mother to change her mind about relinquishing custody. The dispute also provoked a larger debate about whether such arrangements inevitably involved class exploitation since surrogate mothers tended to be poorer and less educated than the couples hiring them. The New Jersey Supreme Court in *In the Matter of Baby M* declared the contract void and likened it to baby selling:

The evils inherent in baby-bartering are loathsome for a myriad of reasons. The child is sold without regard for whether the purchasers will be suitable parents. The natural mother does not receive the benefit of counseling and guidance to assist her in making a decision that may affect her for a lifetime. In fact, the monetary incentive to sell her child may, depending on her financial circumstances, make her decision less voluntary.<sup>148</sup>

After this invocation of family sentiments, the judges relied on the balancing test of the best interests of the child doctrine to determine Baby M's custody. Giving each parent's claim equal weight, they awarded the child to Stern because his home seemed more suitable for the child.<sup>149</sup> In this and related cases generated by the new technologies, the new commitment to diverse forms of parenthood reinforced the inherent appeal of the balancing test embedded in the best interests of the child's doctrine. Louisiana even

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146. *Id.* at 753-54.

147. Mintz, *supra* note 68, at 206-07.

148. 537 A.2d 1227, 1241 (N.J. 1988) (citation omitted).

149. *Id.* at 1256-64.



extended the rule to new forms of reproduction by insisting that "disputes between parties should be resolved in the 'best interests of the embryo' and that interest would be 'adoptive implantation.'" <sup>150</sup>

Finally, despite the broad debate over parenting carried on in the era, the proliferation of family forms, and even the emergence of what came to be called social parenting, biological ties continued to outweigh the custody claims of other custodians. Foster parents in particular failed to secure legal support for the families they created even though foster care had become the preferred form of placing children removed from their homes. Instead, foster parents were treated more like a vendor with a contract than a parent in a functioning family. The Supreme Court sanctioned that secondary status in *Smith v. Organization of Foster Families*, <sup>151</sup> a 1977 decision that denied foster families the same status as natural families. <sup>152</sup>

The class action suit claimed for foster parents a constitutionally protected liberty interest in the children they reared and thus a right to a full hearing to determine their fitness before the children could be removed from their care. In rejecting the claim, the Court identified the key issues to be weighed in determining custody. Justice William Brennan admitted that the "usual understanding of 'family' implies biological relationships," but he acknowledged that "biological relationships are not exclusive determination of the existence of a family." <sup>153</sup> Accepting the existence of functioning families, he even lauded them:

[T]he importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in "promot[ing] a way of life" through the instruction of children, as well as from the fact of blood relationship. No one would seriously dispute that a deeply loving and interdependent relationship between an adult and a child in his or her care may exist even in the absence of blood relationship. <sup>154</sup>

Consequently, Brennan recognized that the Court could not "dismiss the foster family as a mere collection of unrelated individuals." <sup>155</sup> Nevertheless, after voicing a commitment to protect the rights of natural parents who had not fully relinquished their children, he felt compelled to underscore the distinctions between foster families and natural families:

It is one thing to say that individuals may acquire a liberty interest against arbitrary governmental interference in the family-like associations into which they have freely entered, even in the absence of biological connection or state-law recognition of the relationship. It is quite another to say that one may acquire such an interest in the face of another's constitutionally recognized

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150. MASON, *supra* note 54, at 144.

151. 431 U.S. 816 (1977).

152. *Id.* at 847.

153. *Id.* at 843.

154. *Id.* at 844 (citation omitted).

155. *Id.* at 844-45.

liberty interest that derives from blood relationship, state-law sanction, and basic human right.<sup>156</sup>

In this way, foster families exposed the limits of the era's debate over custody law. Writing two years later, Morse contended that *Smith* seems to fit the definition that nearly all Americans would accept:

The contours of the legal family seem to depend on marriage and biological or equivalent legal relationships. Relationships that do not have these bases are not considered families, even though they may be functionally equivalent to traditional families. Still, the recognition that "family-like associations" may have some family-like rights, especially where the best interests of children may be involved, reflects a concern for the rights of children and for the autonomy of adults who may obtain some family rights in nontraditional ways.<sup>157</sup>

And similar debates erupted over the custody of adopted children, most notably the recent tragic fight over "Baby Jessica."<sup>158</sup>

In short, in custody law, as in marriage, liberation rhetoric tilted family law toward greater recognition of individual rights and toleration of family diversity. Marriage and custody debates paralleled domestic relations discussions of everything from children's rights and spousal rape to abortion and inheritance rules.<sup>159</sup> The result was a new dominant dialogue for discussing the law.

But, of course, that dominant rhetoric did not tell the whole story. It never does. The debate over family law, especially during the last decade, has been filled with challenges expressed yet again in terms of reversing the law's balance. And the calls for change have come in almost every category of domestic relations. Equally important, the innovations of the recent era have been the targets of complaint. Mintz captured the tenor of the growing complaints and provided a list of the focal points of concern:

[T]he shift toward family laws emphasizing equality and individual rights has come at the expense of certain other values. Our current no-fault divorce system, for example, does a poor job of protecting the welfare of children, who are involved in about two-thirds of all divorces. Compared to the divorce laws in Western European countries, American divorce laws make it relatively easy for noncustodial divorced parents to shed financial responsibility to their ex-spouses and minor children. Child support payments are generally low (and are not adjusted for inflation), and spouses have great leeway in negotiating financial arrangements, including child support (in over 90 percent of all divorce cases, the parties themselves negotiate custody, child support, and division of marital property without court supervision). In addition, feminist legal scholars maintain that under present law, divorced women are deprived of the financial

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156. *Id.* at 846. For a full analysis of the case, see ROBERT H. MNOOKIN ET AL., IN THE INTEREST OF CHILDREN: ADVOCACY, LAW REFORM, AND PUBLIC POLICY Pt. III (1985).

157. Morse, *supra* note 78, at 325.

158. MASON, *supra* note 54, at 187-88. For a general discussion of these issues, see MASON, *supra* note 55, at 156-69.

159. For a recent analysis of these broad changes in family law, see REGAN, *supra* note 88.

support they need. Under no-fault laws many older women, who would have been entitled to lifelong alimony or substantial child support payments under the old fault statutes, find it extremely difficult to support their families. Courts, following the principle of equality, generally require ex-husbands to pay only half of what is needed to raise children, on the assumption that the wife will provide the remainder. Furthermore, the shift toward gender-blind custody standards has led courts to move away from standards that favored the mother—by stressing day-to-day caretaking responsibilities, such as feeding, bathing, dressing, and attending to the health-care needs of the child—and to attach more emphasis on standards that favor the father, such as an emphasis on the child's economic well-being.<sup>160</sup>

As a result of such complaints and concerns, the family has become a battleground yet again. Demands for a return to maternal preference, the reinstitution of fault in divorce, the imposition of greater restrictions on young persons' marital rights, and the institution of custodial restrictions on single mothers have tried to tilt the law back toward family uniformity and public regulation. Once more a moral panic has set in and crystallized worries and anxieties about social change into Jeremiads of family crisis. As fear has replaced confidence, the debate has been framed in terms of altering the balance between individual rights and public regulation by refusing legal recognition to functioning families.

As in the past, the creation of the family law folk devils of our age are perhaps the most illustrative examples of the resulting family law debate. Same-sex marriage fills that unwelcomed role today. Such unions have long been banned either directly by statute or through judicial statutory interpretations.<sup>161</sup> Gay and lesbian claims for the right to wed and the attendant actual and symbolic benefits of matrimony suggest once more how groups of people turn to the law for legal aid and legal recognition. However, as in the cases of other groups denied marriage rights in the past, champions of same-sex marriage threaten, in the apt words of contemporary literary criticism, to decenter the public narrative of family law by challenging accepted meanings of wife, husband, mother, father, family, and marriage. In explaining their support for same-sex marriage, for instance, Yvonne Yarbro-Bejarano and Eleanor Soto underscore its political implications:

[O]ne thing we wanted was to create and make public a perception of lasting commitment among lesbians. In this way, getting married is an important part of building lesbian community. [We] felt there was a very strong political aspect to what we were doing. We weren't imitating an oppressive and sexist heterosexual institution; we were demanding the same rights and privileges of heterosexual couples. Our goal is not to imitate it but to transform it in progressive ways.<sup>162</sup>

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160. Mintz, *supra* note 68, at 194. See also MINTZ & KELLOGG, *supra* note 31, at epilogue.

161. SEXUAL ORIENTATION AND THE LAW 95-101 (Harvard Law Review ed., 1990).

162. Quoted in Mary C. Dunlap, *The Lesbian and Gay Marriage Debate: A Microcosm of Our Hopes and Troubles in the Nineties*, 1 L. & SEXUALITY 64 (1991).

Conversely, the vehement opposition to such claims turned proponents of same-sex marriages into folk-devils. As had others in the past, they stood accused of undermining national morality by threatening the sanctity of matrimony. Don Feder, a columnist and leader of the Christian Coalition, declared: "I do not accept the fantastic notion that two men who met the evening before in a leather bar constitute a family with the same legitimacy as a man and woman whose union is sanctified by commitment and faith, raising their children in a time-honored fashion."<sup>163</sup> The resulting battles between advocates and opponents of same-sex marriage testifies yet again to the contentiousness of debates over family law.<sup>164</sup>

One aspect of this debate is a particularly revealing example of the power of family law's dominant discourse to structure conflict over its rules. In trying to find ways to legitimate their position, proponents and opponents of same-sex marriage have turned to the age-old policy practice of historical analogy to tilt the law's balance toward their goal. Not surprisingly, given marriage law discourse, polygamy and miscegenation have the primary argumentative analogies. For opponents of same-sex marriage like Bruce Fein, polygamy is the most appealing analogy. "Authorizing the marriage of homosexuals, like sanctioning polygamy," he argues, "would be unenlightened social policy. The law should reserve the celebration of marriage vows for monogamous male-female attachments to further the goal of psychologically, emotionally, and educationally balanced offspring."<sup>165</sup> Though he urged that other forms of legal discrimination against gay men and lesbians be re-examined, he drew the line at marriage. In that case, again as with polygamy, Fein concluded that the interests of the majority should outweigh those of a minority.<sup>166</sup>

Thomas Stoddard replied to such arguments with a different lesson from the past and a different analogy. Relying on *Loving*, he argued that the recognition of marriage as a fundamental right meant that prejudice could not be used to legitimately limit individual nuptial rights. "The decision whether or not to marry belongs properly to individuals," Stoddard contended, "not to the government. While marriage historically has required a male and a female partner, history alone cannot sanctify injustice."<sup>167</sup> Like the ban against interracial marriage, he considers the bar to same-sex unions as an unconstitutional form of discrimination that violates the equal protection rights of gay men and lesbians and urged the law be tilted toward individual rights.<sup>168</sup> And these analogies have also been used in the courtroom. The Minnesota Supreme Court, for example, rejected the comparison to *Loving*, and instead drew "a clear distinction between a marital restriction

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163. Quoted in Richard L. Berke, *From the Right, Some Words of Restraint*, N.Y. TIMES, Sept. 17, 1994, § 1, at 9.

164. For a discussion of these issues, see Symposium, *The Family in the 1990's: An Exploration of Lesbian and Gay Rights*, 1 L. & SEXUALITY 1 (1991).

165. Bruce Fein, *Gay Marriage: Should Homosexual Marriage Be Recognized Legally? No: Reserve Marriage for Heterosexuals*, 76 A.B.A. J. 43 (Jan. 1990).

166. *Id.*

167. Thomas Stoddard, *Gay Marriage: Should Homosexual Marriage Be Recognized Legally? Yes: Marriage Is a Fundamental Right*, 76 A.B.A. J. 42 (Jan. 1990). See also Andrew Koppleman, *The Miscegenation Analogy: Sodomy Law as Sex Discrimination*, 98 YALE L. J. 145-61 (1988).

168. Stoddard, *supra* note 167, at 42.

based merely upon race and one based upon the fundamental difference in sex."<sup>169</sup> As the clashing analogies vividly demonstrate, the family remains a litmus test of the well-being of our society.

#### CONCLUSION

I want to conclude by acknowledging that I have dwelt on only two of the three key words in the symposium theme. I have compared then and now, but shied away from speculating about the future. In part the reluctance represents a disciplinary aversion to prediction. Nevertheless, my necessarily brief discussion of a century of family law does lead to two final points. They are predicated on the significance of the assertion that in 1994, as in 1894, contests over who can wed and who is considered a fit parent ignite fierce family law debates and those debates are expressed in terms of finding a proper balance between individual rights and state interests.

First, I think that clashes over same-sex marriage or headline making custody cases like the fight over Baby Jessica emphasize the continuing power of the law to frame legal debates about troubled families in certain ways. Looking backwards does not solve these problems nor lessen their urgency. What it does, I think, is highlight the profoundly contingent character of family law rules and practices. And it reminds us that we too are actors in time and our time constrains the way we view the world. In other words, our inherited way of talking about family law has real consequences.

Second, I think the way we talk about family law also illustrates the critical distinction between hegemony and ideology. By that I mean that contemporary family law disputes, like those of the past, demonstrate again and again the ordering power of the law. It forces family conflict to be expressed through particular rules and procedures that grant the law its legitimacy. However, that ordering role does not produce uniform beliefs. On the contrary, it encourages various ideological convictions. Views on individual family rights, state regulation, and family diversity became the critical issue in those ideological beliefs.<sup>170</sup> The result, I think, is that family law produces repeated generational conflicts but not permanent solutions. Instead, back to playground imagery, the law's balance constantly shifts while the teeter-totter stays in place.

And so, in thinking about the family law that students at Indiana University School of Law in Indianapolis learned then, are learning now, and might learn in the future, I am struck by how similar and how different are their educations. Students who learned the law here in 1894 would be surprised at many of the specific issues that dominate debates about family law today, but they would have recognized how we frame them and talk about them. It is that message of continuity and change I want to add to this Symposium.

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169. *Baker v. Nelson*, 191 N.W.2d 185, 187 (Minn. 1971). See also Nan D. Hunter, *Marriage, Law, and Gender: A Feminist Inquiry*, 1 L. & SEXUALITY 14-15 (1991).

170. For a compelling discussion of the difference between hegemony and ideology, see JEAN COMAROFF AND JOHN COMAROFF, *OF REVELATION AND REVOLUTION: CHRISTIANITY, COLONIALISM, AND CONSCIOUSNESS IN SOUTH AFRICA* ch. 1 (1991).

# THE WARREN COURT: YESTERDAY, TODAY, AND TOMORROW

KERMIT L. HALL\*

## I. THE REVISIONISTS' ATTACK ON LIBERAL INSTRUMENTALISM

Woody Allen once observed that "relationships are like sharks: they either move forward or they die."<sup>1</sup> Much the same can be said about scholars of the Supreme Court: they either revise received wisdom or they perish. There are no good insights, only new insights. The passage of time usually exacerbates this phenomenon, often to the point of making well intentioned prevaricators out of even the most skilled revisionist scholars. As the past recedes, we too often begin to believe that what was real was not, only to discover, upon reflection at anniversaries such as this one marking the quarter century since Earl Warren's retirement, that it really was.

This practice of creative interpretation has become pronounced in the scholarship treating the Warren Court. President Richard Nixon understood the Court and the political stakes created by its work better than many scholars do today. Nixon exclaimed repeatedly in the course of the 1968 campaign that the Court's decisions had "gone too far in weakening the peace forces as against the criminal forces of this country."<sup>2</sup> Nixon promised to select only strict constructionists, Justices who would stop the coddling of criminals, restore the proper place of the states in the federal system, and promote respect for family values. Yet today we seem to have forgotten Nixon's simple lesson. We have so disentangled the Warren Court and its jurisprudence from their historical contexts that we fail to appreciate that Court's singular place in the American constitutional experience.

The traditional, consensus approach to the Warren Court, like Nixon, took the Justices' liberalism seriously. Scholars such as Martin Shapiro, Robert Dahl, Anthony Lewis, Archibald Cox, Bernard Schwartz, and G. Edward White, while addressing the Warren Court in somewhat different ways, nonetheless concluded that it was instrumental in its aims, policy making in its decisions, and committed to enhancing the rights of historically underrepresented groups.<sup>3</sup> This liberal, instrumental interpretation held that the Warren Court shared a general commitment to social ends such as efficiency, humanitarianism, equality of economic opportunity, and equal treatment before the law. According to this interpretation, the Warren Court was an engine of modern liberal reform

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1. ANNIE HALL (United Artists 1977).

2. GERALD T. DUNNE, HUGO BLACK AND THE JUDICIAL REVOLUTION 409 (1977).

3. MARTIN SHAPIRO, LAW AND POLITICS IN THE SUPREME COURT (1964); Shapiro, *The Constitution and Economic Rights*, in *ESSAYS ON THE CONSTITUTION OF THE UNITED STATES* (M. Judd Harmon ed., 1978); Shapiro, *Judicial Activism*, in *AMERICA IN THE TWENTY-FIRST CENTURY* (S. Lipset ed., 1979); Shapiro, *The Supreme Court: From Warren to Burger*, in *THE NEW AMERICAN POLITICAL SYSTEM* (Anthony King ed., 1978); Shapiro, *Fathers and Sons: The Court, the Commentators, and the Search for Values*, in *THE BURGER COURT: THE COUNTER REVOLUTION THAT WASN'T* (Vincent Blasi ed., 1983); Robert Dahl, *Decision Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279 (1957); Anthony Lewis, *Earl Warren*, in 4 LEON FRIEDMAN & FRED L. ISRAEL, *THE JUSTICES OF THE UNITED STATES SUPREME COURT* (1969); LEWIS, *GIDEON'S TRUMPET* (1964); LEWIS, *MAKE NO LAW* (1991); ARCHIBALD COX, *THE WARREN COURT* (1968); COX, *THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT* (1976); BERNARD SCHWARTZ, *SUPER CHIEF* (1983); G. EDWARD WHITE, *EARL WARREN: A PUBLIC LIFE* (1982).

powered by a substantive jurisprudence that stressed results and gave only modest attention to *polity* principles.

Three schools of revisionist scholarship have sharply challenged this liberal-instrumentalist view. Conservatives argue that political bias and problematic scholarship characterized the Warren Court. Gary McDowell and Raoul Berger, among others, condemn Warren and his colleagues for faulty constitutional reasoning, a muddled reading of the founding generation and its fidelity to the Constitution, and usurpation of legislative authority.<sup>4</sup> The conservatives agree with the liberals that the Warren Court was instrumental, but they insist that this instrumentalism had ruinous results, both in terms of public policy and the authority of the Court. The Justices, according to these scholars, ran amuck in their own liberalism and welfare stateism.

A second body of scholars, the so-called civic republicans, view the Warren Court from a perspective at once sympathetic with, yet critical of, the Justices. Michael Perry, Mark Tushnet, and Sanford Levinson, for example, while differing on the particulars, agree that there is no necessary connection between constitutional choices and good moral values, and that each choice, therefore, must be analyzed with regard to moral theory and outcomes.<sup>5</sup> This view holds that politics and law should not be based on raw power and preferential self-interest; instead, it posits that both should respond to and protect the public good.

The civic republicans take exception to the level of success achieved by the Court and to the grounds upon which the liberal majority rested its position. If anything, the Warren Court acted *too* instrumentally, failing to anchor its policy positions in concern about the common good and in exalting individual rights at the expense of community interests. The Warren Court erred because it presumed to do those things in politics which its power, and the power of any judicial body, could never reach legitimately. According to the civic republicans, the appropriate means of social transformation resides in the political branches, and not in the courts.

A third revisionist interpretation not only blends elements of the other two, but succeeds in standing the Warren Court on its head in doing so. This "constitutive" interpretation asserts, with a remarkable historical flourish all too familiar in much of the scholarship dealing with modern constitutional jurisprudence, that "[i]t is important to note that the Warren Court's genius was not of its own making."<sup>6</sup> Ronald Kahn, for example, argues that the Warren Court was neither concerned with rights nor due process; instead, its approach was "constitutive," not "instrumental." The Justices of the Warren Court well understood the limits of their powers and realized that their most important task was to find the best way to constitute the political and legal communities, to take doctrinal debates seriously, and to disregard the pressure of the ballot box for such change. The Warren Court, it turns out, really was not politically motivated; instead, it was overwhelmingly a legal institution, one in which the rule of law—the Constitution,

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4. GARY L. MCDOWELL, *THE CONSTITUTION AND CONTEMPORARY CONSTITUTIONAL THEORY* (1985); RAOUL BERGER, *GOVERNMENT BY JUDICIARY* (1977).

5. MICHAEL J. PERRY, *MORALITY, POLITICS AND LAW* (1988); MARK TUSHNET, *RED, WHITE AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW* (1988); SANFORD LEVINSON, *CONSTITUTIONAL FAITH* (1988).

6. RONALD KAHN, *THE SUPREME COURT AND CONSTITUTIONAL THEORY* (1994).

precedents, and fundamental rights and legal principles—influenced judicial decisionmaking. The Warren Court fashioned only modest adjustments in the constitutional landscape and its most important contributions were only fully realized under the leadership of Warren's successor, Warren Burger. The constitutive interpretation, by focusing so fully on constitutional theory and jurisprudence, drains the Warren Court of life.

These revisionist interpretations tend to diminish the Warren Court's stature and to deny the singular nature of social and political change in the 1950s and 1960s. They rob the Warren Court of either its legitimacy or its energy, and in some cases both. Kahn, for example, tells us that in the past quarter century life has become more complex, leaving a sense that the Warren Court in some ways faced a challenge less daunting than does our own time. The conservatives crudely argue bad faith and a lack of principle on the part of the Justices. The civic republicans admire the Warren Court's efforts but find the Court unable to offer a coherent theory of constitutional politics.

No doubt each of these views has some merit, yet each of them make the Warren Court something less than the major historical force it was. On this twenty-fifth anniversary of Earl Warren's retirement, it seems appropriate to shift our attention from matters of theory and jurisprudence and recall what the Warren Court did—to put it in historical perspective. One of the best ways to do so is by listening to the times *and* by heeding what contemporary critics of the Justices, like Richard Nixon, had to say.

## II. THE WARREN COURT IN THE HISTORY OF THE SUPREME COURT

Perhaps nowhere is such an approach more important than on the simple question of whether the Warren Court really existed. A good number of revisionist scholars apparently have doubts. Some scholars have not only questioned the proposition that there was a Warren Court, but have concluded that naming Supreme Court epochs after Chief Justices is problematic at best and misleading at worst. There has often been considerable overlap in the Associate Justices on the Court even after the Chief leaves the bench. More than seventy percent of all Associate Justices appointed to the High Court outlast the Chief Justice serving at the time of their appointment. That was certainly the case with the Warren Court. Of the eight Associates appointed during Warren's term, only one, Charles Whittaker, left before Warren's retirement. Two leading scholars take the position that the Warren Court should be called the Brennan Court. Dennis Hutchinson argues that "[t]o the extent that the Court over which Warren presided has any intellectual legacy that is accessible to those trained in doctrine and not in ethics, it is Brennan who is responsible."<sup>7</sup> Robert Post proposed that the Warren years really should be called the "Brennan Court" era because Associate Justice William Brennan, who only missed participating in one landmark decision, *Brown v. Board of Education*,<sup>8</sup> outlived Warren and was the most effective banner carrier for liberal jurisprudence from the 1960s to the early 1990s.<sup>9</sup>

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7. Dennis Hutchinson, *Hail to the Chief: Earl Warren and the Supreme Court*, 81 MICH. L. REV. 922, 924 (1983).

8. 349 U.S. 294 (1955).

9. Hutchinson, *supra* note 7, at 924; Robert C. Post, *Justice William J. Brennan and the Warren Court*,



Some Chief Justices did not stay long enough to have much of an impact on the Court. Such was certainly the case with John Jay, John Rutledge, and Oliver Ellsworth early in the history of the Court; the same was true with Harlan Fiske Stone and Fred Vinson more recently. Chief Justices can also stay too long; their influence becomes diminished when transformations in the political culture bring appointees to the Court either not of the same political generation nor of the same ideological views as the Chief. Both John Marshall and his successor, Roger B. Taney, faced similar fates because Andrew Jackson, in the case of the former, and Abraham Lincoln, in the case of the latter, placed members on the High Court whose views were radically at odds with those of the Chief Justice. By the time of their deaths, both Marshall and Taney had essentially lost control of their respective courts.<sup>10</sup> Both of these Chief Justices served more than double Warren's sixteen years on the bench.

Warren's term as Chief Justice was about average, and, even more importantly, he had enormous good luck in the way that appointments fell during his time on the bench. Within three years of taking the position of Chief Justice, the composition of the Court underwent radical change. Four of the Associate Justices left: Stanley Reed, Robert H. Jackson, Harold H. Burton, and Sherman Minton. Either Presidents Franklin D. Roosevelt or Harry Truman appointed all of these Justices. None of them, with the exception of Jackson, was much of a force on the Court. Their replacements were not only more talented jurists but political moderates of a comparable if not quite similar ideological stripe to that of Warren.<sup>11</sup>

This ideological continuity was a central feature of the Warren Court, and its presence, along with Warren's leadership, helped to define the era. Republican President Dwight Eisenhower made four appointments to the bench in addition to Warren. He selected John Marshall Harlan, III, in 1955, William J. Brennan, Jr., in 1956, Charles Whittaker in 1957, and Potter Stewart in 1958. Only Harlan and Stewart emerged as anything like the representative voice of the constituency that elected Ike. Brennan became an important liberal voice on the Court; Whittaker served only four years. Byron White, one of President Kennedy's two appointments to the High Court, replaced Whittaker. Eisenhower concluded that in the cases of Warren and Brennan, he had made his two biggest political mistakes. Even Harlan was a moderate conservative. The other appointments were all made by Democratic presidents and the major holdovers, Hugo Black, William O. Douglas, and Felix Frankfurter, were selected by Democratic President Franklin D. Roosevelt. In short, there was a strong ideological predisposition in favor of liberal instrumentalism that came to typify the Warren Court.<sup>12</sup>

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8 CONST. COMMENTARY 11 (1991) reprinted in *THE WARREN COURT IN HISTORICAL AND POLITICAL PERSPECTIVE* 123 (Mark Tushnet ed., 1993).

10. The best historical discussion of the office of Chief Justice is contained in ROBERT J. STEAMER, *CHIEF JUSTICE* 219-57 (1986). Concerning the effect of a too-long tenure on Marshall and Taney, see KENT NEWMYER, *THE SUPREME COURT UNDER MARSHALL AND TANEY* 26, 89 (1968).

11. HENRY J. ABRAHAM, *JUSTICES AND PRESIDENTS* 251-295 (3d ed. 1992).

12. *Id.* There was greater ideological continuity on the Warren Court than on the Court under Burger although they shared many of the same values. BERNARD SCHWARTZ, *A HISTORY OF THE SUPREME COURT* 331 (1993); Vincent Blasi, *The Rootless Activism of the Burger Court*, in *THE BURGER COURT* (Vincent Blasi ed., 1983).

Warren's contribution to the Court was his ability to lead this liberal majority toward important changes in public policy. If he had not done so, then the case for the Warren Court would be less persuasive. His major biographer, G. Edward White, explained that Warren succeeded through his leadership in investing "his Court with a discernible character, if not necessarily a coherent jurisprudence."<sup>13</sup>

Scholars today disagree about what attributes contribute to the success of a Chief Justice.<sup>14</sup> Some argue that technical proficiency in the law is more important than result orientation. For example, many students of the High Court believe Charles Evans Hughes was the greatest Chief Justice of the twentieth century because he commanded his colleagues by force of intellect and technical legal ability. Justice William O. Douglas concluded that in sheer legal talent "Warren was closer to Hughes than any others. Burger was close to Vinson. Stone was somewhere in between."<sup>15</sup> Hughes, however, exercised that leadership through a photographic memory, authoritative demeanor, and personal charisma. Hughes, according to Stone, conducted conferences "much like a drill sergeant."<sup>16</sup>

Warren shaped and defined his court in an entirely different way. His style was reminiscent of John Marshall, who depended on charm, an even temperament, an ability to have others warm to him, and on a vision of the Court's role.<sup>17</sup>

Warren, however, was not a legal scholar; he was a former governor and district attorney. He was a "politician, a big bear of man with great personal charm."<sup>18</sup> Justice Potter Stewart once commented that "[w]e all loved him."<sup>19</sup>

Warren also possessed great self-confidence. Initially, he relied on this quality to compensate for his lack of experience with the High Court, and it served him well throughout his tenure, especially in dealing with Felix Frankfurter who tried and ultimately failed to bring Warren under his influence. Warren turned Frankfurter's imperious style to his advantage by successfully building strong personal relations with the other Justices, most notably William J. Brennan.<sup>20</sup> Warren was smart enough to understand that he and Brennan shared similar views on important matters and that together they were likely to build the level of support necessary to reach those goals on the High Court. Commentators today, who concentrate on Brennan's twenty-year career after Warren retired, tend to read too much into the relationship when the two of them were on the Court together.<sup>21</sup> Like Brennan, Warren shared a result-oriented view of the Court's business.

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13. G. EDWARD WHITE, *THE AMERICAN JUDICIAL TRADITION* 318 (1976).

14. DAVID M. O'BRIEN, *STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS* 186-89 (1986).

15. *Id.* at 186 (quoting WILLIAM O. DOUGLAS, *THE COURT YEARS* 223, 226, 227 (1980)).

16. *Id.* at 187 (quoting memorandum of Howard Westwood, Stone Papers, Box 48, LC).

17. G. EDWARD WHITE, *THE MARSHALL COURT AND CULTURAL CHANGE* 365-75 (1988).

18. O'BRIEN, *supra* note 14, at 188.

19. O'BRIEN, *supra* note 14, at 188.

20. Warren took to the practice of consulting with Brennan on the Thursday preceding the Friday conference. O'BRIEN, *supra* note 14, at 188.

21. G. Edward White, *Earl Warren's Influence on the Supreme Court*, in *THE WARREN COURT IN HISTORICAL AND POLITICAL PERSPECTIVE* 37, 46 (Mark Tushnet ed., 1993). The case for Brennan's role is made most forcefully by Hutchinson, *supra* note 7; Post, *supra* note 9.

Warren left his mark on the Court in other ways. In managing the case load, for example, he concentrated on forging majorities. To do that he successfully directed the energy that came from the clash of competing jurisprudential attitudes wrapped up in strong personalities such as Felix Frankfurter, William Douglas, and Hugo Black.

Although the Court had a liberal majority, it did not follow that the Justices readily agreed with one another. To the contrary, dissent rates continued the steady rise that had begun during the chief justiceship of Harlan Fiske Stone.<sup>22</sup> There was no intellectual leader on the Warren Court, we should remember; instead, several strong figures, Black, Douglas, Frankfurter, Harlan, and Goldberg, stood in uneasy coexistence. Warren's challenge was to mold this talented but frequently quarrelsome group.

Warren did so through his power to assign opinions. "During all the years," Warren observed in retirement, "I never had any of the Justices urge me to give them opinions to write, nor did I have anyone object to any opinions that I assigned to him or anyone else."<sup>23</sup>

Warren made his Court work through consultation and an evenhanded distribution of opinion writing. Unlike John Marshall, who dominated his brethren by writing the bulk of his Court's opinions, Warren led through collaboration, often using the assignment of opinions as a way of guiding the Court.<sup>24</sup> Nowhere was the success of this approach more apparent than in *Baker v. Carr*,<sup>25</sup> a 1962 decision that Warren believed to be more important than any other during his time on the Court. The opinion was written by Justice Brennan, but had Warren's influence stamped all over it. Moreover, Warren assigned the opinion to Brennan because he was urged to do so by Black and Douglas, both of whom believed that Brennan's views were closer to those of Potter Stewart, the necessary fifth vote for a majority.<sup>26</sup>

When placed in historical perspective, Warren emerges as perhaps the most persuasive and persistent Chief Justice the Court has ever had. Warren was not a great lawyer in the mold of Taney or Hughes, not a great legal scholar like Brandeis or Frankfurter, not a supreme stylist like Cardozo or Jackson, not a judicial philosopher like Holmes or Black, not a resourceful, efficient administrator like Taft or Burger. Nonetheless, he was the most important presence on the Court from 1953 to 1969; that is why it is fair to name the Court of this period after him. He was second in institutional leadership only to Marshall, at least as measured by impartial critics of the Court.<sup>27</sup> As Henry Abraham wrote, Warren "was his court, the judicial activist Court."<sup>28</sup>

If it is fair to claim the existence of the Warren Court, then it is also appropriate to note that, like other eras of the Court's history, the Warren period had its own phases. There were, in fact, two Warren Courts. During the first phase, from 1953 to 1962, the

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22. William J. Dixon, *On the Mysterious Decline of Consensual Norms in the United States Supreme Court*, 50 J. POL. 361 (1988).

23. O'BRIEN, *supra* note 14, at 247.

24. NEWMYER, *supra* note 10, at 24.

25. 369 U.S. 186 (1962).

26. O'BRIEN, *supra* note 14, at 247.

27. ALBERT P. BLAUSTEIN & ROY M. MERSKY, *THE FIRST ONE HUNDRED JUSTICES* 45 (1978); ABRAHAM, *supra* note 11, at 259.

28. ABRAHAM, *supra* note 11, at 259.

Court did not have a major public presence with the notable exception of *Brown v. Board of Education*.<sup>29</sup> In those years an imperfect match existed between the public perception of the Warren Court as liberal, largely because of its decisions in race related cases, and the day-to-day reality. The Court Warren inherited from Fred Vinson at the beginning of the 1953 term was not liberal in the realm of civil liberties. The early Warren Court was indifferent to the rights of the accused in state courts and inconsistent in its protection of First Amendment rights.<sup>30</sup> Moreover, not until the 1961 term did the Court begin to take such matters seriously. From 1953 to 1961 the Court's percentage of liberal civil rights and liberties decisions ranged from a low of forty-seven percent in 1953 to a high of sixty two percent in 1954. Following the 1960 term, in which fifty-four percent of these cases were decided liberally, the proportion jumped to eighty percent in the 1961 term and remained in the seventies or above for six of the remaining seven years of the Warren Court.<sup>31</sup>

This dramatic shift in the early 1960s is almost universally recognized, but explanations vary about why it occurred. The conventional wisdom ascribes the shift to the appointment of Goldberg at the beginning of the 1962 term.<sup>32</sup> The major changes in the Court's direction came because of the incapacity suffered by Justice Frankfurter as a result of a stroke and the mid-term retirement of Justice Whittaker, both developments that shifted influence to Justice Stewart.<sup>33</sup>

After the 1962 term, the Warren Court emerged as the powerful institution of liberal change against which Nixon and others railed. The Court routinely took a strong liberal position in eighty percent of civil liberties cases.<sup>34</sup>

The Warren Court was distinctive in another way. The majority of its Justices invariably adopted innovative approaches to major constitutional controversies. Warren and at least four of his colleagues, Douglas, Brennan, Fortas, and Marshall, had little sustained interest in general matters of constitutional theory. Such behavior, while not unique, certainly stood out from the practices of the nineteenth century, when Justices such as Joseph Story, Joseph Bradley, and Stephen J. Field persisted in a longstanding quest to rationalize the Court's actions with acceptable constitutional theory. The Warren Court Justices were remarkable for their lack of concern about the era's main currents of constitutional thought. Warren did not agree, he wrote in his memoirs, "with the so-called doctrine of 'neutral principles.' It . . . is a fantasy," he continued, "and is used more to avoid responsibilities than to meet them. As the defender of the Constitution, the Court cannot be neutral . . . ."<sup>35</sup> The great controversy over incorporation, which brewed throughout the Warren Court era, was evidence enough of precisely that lack of concern.<sup>36</sup>

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29. 349 U.S. 294 (1955).

30. See, e.g., *Breithaupt v. Abram*, 352 U.S. 432 (1957); *Watkins v. United States*, 354 U.S. 178 (1957); *Barenblatt v. United States*, 360 U.S. 109 (1959).

31. Jeffrey A. Segal & Harold J. Spaeth, *Decisional Trends on the Warren and Burger Courts: Results from the Supreme Court Data Base Project*, 73 JUDICATURE 103, 104 (1989).

32. *Id.* at 104 n.6.

33. *Id.* at 104.

34. *Id.*

35. EARL WARREN, *THE MEMOIRS OF EARL WARREN* 332-33 (1977).

36. Mark Tushnet, *The Warren Court as History*, in *THE WARREN COURT IN HISTORICAL AND*

In this setting, the role of a Justice was to figure out the right answer, as a matter of public necessity and not some abstract theory of justice. Underlying this approach was the belief that the Constitution was a living document, and that the Justices had a responsibility to facilitate its evolution and development.<sup>37</sup> Such a view set the Warren majority in sharp contrast with its predecessors, especially those eras of the Court's history that had stressed their formalist role. At the same time, the Warren Court was also notable because it managed to shift the emphasis in the developmental character of the Constitution to one that stressed individual rights.

Like Courts of other eras, the Warren Court had a reciprocal and reinforcing relationship with its own times. It reflected much of the sympathies of the New Dealers; and its liberal policies extended beyond the period of Earl Warren's chief justiceship. Still, there was without a doubt a Warren Court, an identifiable judicial entity of which we can make sense and which was distinctive in the overall history of the Supreme Court.

### III. THE WARREN COURT AND ITS TIMES

Throughout American history, constitutional law has developed in constantly changing dialogue between the Court and the country, and the Warren Court was no exception. For example, the Warren Court did not discover the issue of race and its pernicious effects on American life. That matter had been part of the original constitutional understanding, an understanding earlier Justices had enforced by countenancing first slavery and then, following the Civil War, a system of de jure segregation. By the 1930s, however, the Court had begun the tortured process of reexamining its previous decisions in this area, not so much because it wished to do so but because the newly created National Association for the Advancement of Colored People pressed it to do so. To that extent, the Warren Court's great decision in *Brown v. Board of Education*<sup>38</sup> built upon and expanded a line of constitutional development begun much earlier.<sup>39</sup> At the same time, it contributed to the constitutional elaboration of race issues during the remainder of the Warren Court and beyond. Much the same can be said in other areas of constitutional law, notably the rights of the accused, First Amendment free expression and religion cases, and the development of the idea that the political thicket was, in the end, not nearly as thorny as previous courts had believed. Each of these areas of major Warren Court constitutional development had been cultivated by earlier Courts, and once these areas were treated by Warren and his colleagues, they contributed to developments in American society.

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POLITICAL PERSPECTIVE 18 (Mark Tushnet ed., 1993).

37. Morton J. Horwitz, *The Warren Court and the Pursuit of Justice*, 50 WASH. & LEE L. REV. 5 (1993).

38. 349 U.S. 294 (1955).

39. *Missouri ex rel Gaines v. Canada*, 305 U.S. 337 (1938) (denial of admission to law school); *Mitchell v. United States*, 313 U.S. 80 (1941) (exclusion from Pullman berth); *Shelley v. Kraemer*, 334 U.S. 1 (1948) (restrictive covenant); *Henderson v. United States* 339 U.S. 816 (1950) (exclusion from railroad dining car); *Sweatt v. Painter*, 339 U.S. 629 (1950) (segregated law school); *McLaurin v. Oklahoma State Regents*, 339 U.S. 637 (1950) (segregated graduate school); *Brown v. Board of Education*, 347 U.S. 483 (1954) and 349 U.S. 294 (1955).

To recognize that the Warren Court built on the work of its predecessors merely underscores that it is in such ways that the Court works. The Warren Court stood out, however, because in each of these areas it brought about a resolution of existing law that was at once transformative and liberating.

In an era in which political outsiders pressed their case with more energy than ever before, the Warren Court responded. Doing so made it distinctive in the history of the Court, and, for the first and only time, the Justices empathized with the concerns of social and political outsiders. The Court, of course, has had a long history of protecting minority rights, but in most instances that protection has been aimed at property rights rather than at human rights. In this way, the Warren Court was notable because it concluded that discrimination was not a random, individualized act but a governmentally supported set of social preferences structured along cultural lines. Warren and his liberal colleagues were eager to attack the concept of state action through the incorporation doctrine because they realized that by doing so they held the power to redefine political and social relationships in favor of those who had previously been disadvantaged.

The Warren Court was very much *in*, not outside the stream of history, as some revisionist scholars are prone to argue. The Justices operated in a political culture in which big government had been accepted, indeed embraced. To suggest that this environment was in any meaningful way less complex and demanding than our own so woefully misses the point as to trivialize much contemporary history. The rise of legislative and executive power over economic matters was one of the enduring legacies of the New Deal, a legacy that remains firmly in place today and that shaped the actions of not only Warren but those of his colleagues and the litigants that appeared before them. It is also the source of much that is perplexing in modern economic life.

President Franklin Roosevelt's shock treatment in the Court-packing plan left little doubt that the Justices no longer had broad support to intervene in economic matters. It was a lesson learned by successor courts, especially the Court over which Warren presided. Between 1953 and 1969 the Court did not declare a single piece of federal legislation regulating property unconstitutional, and it invalidated only a few state laws regulating industry and providing welfare programs as interferences with contract or property rights. While revisionists such as Kahn have made it fashionable to believe that the High Court does not read the election returns, there is ample evidence that the post-New Deal Court, including that of Earl Warren, had no interest in refighting the battle of property rights, since that battle had been conceded to the legislative branch and the administrative state.<sup>40</sup>

The Warren Court, however, was a product of its time, just as were previous courts. What was embarrassingly obvious was that economic security, at least the level of security envisioned by the New Deal, was overly optimistic. The problem of raising the level of political and social rights, however, required an effort similar to that made by the federal government in securing economic rights. It also presented an entirely different, and in many ways more complicated, problem than revisionists admit, given the nation's prevailing class and race relations. Where government had exercised its authority in the past, it had done so in a way to promote differences and discrimination, whether through segregation, the poll tax, state-sanctioned religious practices, or limits on speech and

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40. PAUL MURPHY, *THE CONSTITUTION IN CRISIS TIMES, 1918-1969* at 459 (1972).

press. At the time of the Warren Court, these practices were deeply embedded and entirely supportive of the existing political and social order. The quest to enhance social and political rights was a uniquely judicial and legal task, since the existing centers of political and social power were unlikely to change their behavior without some pressure. The Warren Court responded to this challenge by clearing out a legal thicket of archaic interpretations that were simply not going to be swept away through elected democratic practices.

In retrospect, conservative critics of the Warren Court argue that it should not have done what it did because it usurped power either from the other federal branches or from state and local governments.<sup>41</sup> Yet here again the Warren Court Justices inherited an institutional legacy that encouraged them to embrace controversial issues that could not find resolution elsewhere in the governmental structure.<sup>42</sup> Previous courts had been disposed more often than not to resolve such matters in favor of property rights and community rather than individual interests. For example, meaningful racial integration of public schools and other public facilities could not be achieved without removing the standing gloss of "separate but equal" on the Equal Protection Clause of the Fourteenth Amendment.<sup>43</sup> Congress had great difficulty accepting the limited civil rights measures proposed by the Truman administration, none of which even came close to addressing the issue of segregation. Congress was not likely to strike down local laws designed to muzzle protestors seeking a new level of individual rights nor to address, under the First Amendment, protection for religious minorities. The literal wording of the First Amendment made clear that Congress was explicitly prohibited from doing so. There was no way under existing political arrangements that Congress was going to break the long-standing practice of rural domination of state legislatures. As a matter of constitutional law and practice, crime control and policing had historically been left to state, and especially local, officials. Practices varied widely from state to state, and more often than not, varied in quality within these areas based on the races of the victims and the accused.

Perhaps as important, the Court was operating within the structure of its own constitutional purposes. Revisionists have fastened on the Warren era as the most blatant example of runaway judicial activism. The result, they insist, was the rise of an imperial judiciary.

Yet the Court had historically performed the role of construing established statutes and legal language in the context of both initial meaning, so-called original intent today, and current societal demands. The results were simply different in the Warren era. When, for example, Chief Justice Roger B. Taney and his colleagues held in *Dred Scott* that no person of African American heritage could be a citizen of the United States,<sup>44</sup> they were

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41. See sources cited in *supra* note 4. Warren was quick to dump cold water on the notion that the justices did the bidding of the public. "Every man on the Court must choose for himself which course he should take . . . . To habitually ride the crests of the waves through the constantly recurring storms that arise in a free government, always agreeing with the dominant interests, would be a serene way of life. . . . As tempting as that might be, I could not go that way." WARREN, *supra* note 35, at 332.

42. Richard Funston, *The Supreme Court and Critical Elections*, 69 AM. POL. SCI. REV. 795 (1975); WILLIAM LASSER, *THE LIMITS OF JUDICIAL POWER* (1988).

43. *Plessy v. Ferguson*, 163 U.S. 537 (1896).

44. *Scott v. Sandford*, 60 U.S. 393 (1857).

greeted with a uniform chorus of condemnation by Abraham Lincoln and the Republican Party for usurping power through judicial law making.<sup>45</sup> Many more Democrats, however, applauded Taney's boldness. Hence, the Warren Court was able to move legitimately toward assuring the values of equality, fairness, natural justice, and morality in individual and public relationships because the history of the Court had long since established that it could do so.

Warren and the majority of the Court also took seriously the duty imposed on them by their oath of office to "administer justice without respect to persons, and do equal right to the poor and to the rich."<sup>46</sup> Such a position, however, stirred one or another group to condemn most of the Court's landmark decisions. These changes in the direction of the Warren Court were important, and they belie the notions put forth by some that, on balance, the Warren Court Justices were not really liberal at all or, at the same time, that the Justices had, to cite the famous *Southern Declaration on Integration*, "undertook to exercise their naked judicial power and substituted their personal political and social ideas for the established law of the land."<sup>47</sup> First its critics, and then many scholars, made a caricature of the High Court.

In the wake of *Engel v. Vitale*,<sup>48</sup> for example, Representative George W. Andrews of Alabama asserted: "They put the Negroes in the schools, and now they've driven God out."<sup>49</sup> Representative L. Mendell Rivers of South Carolina asserted that as a result of *Engel* the Court "has now officially declared its disbelief in God."<sup>50</sup>

These protests seem not to have phased Warren and his colleagues. Legal scholars particularly have given so much attention to the jurisprudential workings of the Warren Court that they have often missed the obvious literal-mindedness and courage of the liberal majority and especially of its Chief Justice. America had historically professed ideals of equality, fairness, and justice. Why shouldn't such ideals be supported in constitutional law and through the actions of the Supreme Court? "So many times in life," Warren wrote, "the only permanent satisfaction one can find comes from bucking an adverse tide or swimming upstream to reach a goal."<sup>51</sup> While some scholars have perhaps gone too far in arguing that the Warren Court was committed to a scheme of equitable jurisprudence, there is little doubt that the Warren Court majority believed that early generations of Americans had, at best, given lip service to these concepts and that it was appropriate, at this juncture in the nation's history, for the Justices to end the process by which such ideals had been compromised, qualified, and even destroyed.<sup>52</sup>

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45. DON E. FEHRENBACHER, *THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS* (1978); HAROLD M. HYMAN & WILLIAM M. WEICEK, *EQUAL JUSTICE UNDER LAW: CONSTITUTIONAL DEVELOPMENT, 1835-1875* at 190-92, 196-97 (1982).

46. WARREN, *supra* note 35, at 332.

47. *Southern Declaration on Integration*, March 12, 1956 reprinted in *AMERICAN LEGAL HISTORY: CASES AND MATERIALS* 514-15 (Kermit Hall et al. eds., 1991).

48. 370 U.S. 421 (1962).

49. LEO PFEFFER, *THIS HONORABLE COURT* 421 (1965).

50. *Id.* at 422.

51. WARREN, *supra* note 35, at 332.

52. PETER HOFFER, *THE LAW'S CONSCIENCE* 2-6 (1990).



In many ways, this strain of Warren Court commitment—to the reconciliation of professed values with behavior—did more than anything else to stir the ire of its critics, many of whom believed that they were being blamed for having benefitted from such hypocrisy. The Court's actions placed it squarely at odds with one of the central contradictions of the American experience, one too often ignored.<sup>53</sup> The majority of Americans had come to embrace the contradiction between theory and practice in many areas of life. Although millions of Americans professed this belief in freedom, liberty, and equality, they simultaneously abstained from conducting themselves according to these rules of moral behavior. In responding to this contradiction, the High Court initiated an extended educational dialogue with the American public about the extent of the Justices' responsibility to first recognize and then resolve the tension between moral thought and actual conduct.

The Warren Court's revolution in public law promoted acrimony and bitterness precisely because it empowered those who had previously not had the opportunity to exercise power. Whether we approve of their behavior or not, there is little doubt that these new groups added dramatic and often disturbing wrinkles to the contours of American society. Much of what the Warren Court did was to release dissident minorities from longstanding legal and social strictures. Critics complained that the Court was the root of the problem; it was fostering subversive action by civil rights advocates, Communist agitators, criminals, smut peddlers, and racketeers who avoided accountability by hiding behind the Fifth Amendment.

One of the more interesting yet unexplored aspects of the Warren Court was the extent to which the Justices themselves appreciated the consequences of their actions. While we can embellish the Court's actions by labelling the Justices as either interpretivists or noninterpretivists, as originalists or non-originalists, or as advocates of constitutive or polity theories of governance, the inescapable fact is that they knew what they wanted, and, often times, if they did not exactly achieve it, they came close. For example, in the case of *New York Times v. Sullivan*,<sup>54</sup> Hugo Black asked the counsel for three white city commissioners from Montgomery, Alabama if he could seriously argue that a newspaper advertisement by the supporters of Martin Luther King, Jr., which called into question Lester B. Sullivan's public conduct, would actually hurt him with his all-white political supporters.<sup>55</sup> The Court ultimately held that Sullivan had not been libeled as a matter of constitutional law and practical politics.

Nor was Warren so naive as to believe that what he and his colleagues wanted could be accomplished without controversy. "Every man who has sat on the Court," Warren wrote in retirement, "must have known at the time he took office that there always has been and in all probability always will be controversy surrounding that body." Warren continued:

Accordingly, I venture to express the hope that the Court's decisions always will be controversial, because it is human nature for the dominant group in a nation to keep pressing for further domination, and unless the Court has the fiber to

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53. MURPHY, *supra* note 40, at 462-63.

54. 376 U.S. 254 (1964).

55. LEWIS, MAKE NO LAW, *supra* note 3, at 151.

accord justice to the weakest member of society, regardless of the pressure brought upon it, we never can achieve our goal of 'life, liberty and the pursuit of happiness' for everyone.<sup>56</sup>

This goal, of course, is articulated in the Declaration of Independence and not the Constitution.

The constitutional revolution unleashed by the Court created serious problems which are still echoed in today's debates about the High Court. The exercise of judicial power to achieve social goals opened the Court to charges that it had departed from its traditional role and had become primarily a legislative body. In essence, critics charge, the unelected Justices substituted their views for those of elected and therefore properly representative legislators. Such an argument misses the point that many of these issues were beyond the grasp, either by law or by force of will, of the political branches of government.

Yet the Warren Court *was* often on shaky ground when it attempted to justify its conduct. The great English legal historian Sir William Holdsworth once wrote that "for certainty in the law, a little bad history is not too high a price to pay."<sup>57</sup> Warren and his colleagues perhaps too frequently followed Holdsworth's advice. The Justices were wildly bad historians, so misreading the historical record on such matters as freedom of conscience and race relations as to call into question the soundness of their approach to these matters. Even worse, the Justices frequently argued the fine points of history with one another and, in the process, added to the sense of illegitimacy that accompanied several of their boldest pronouncements.<sup>58</sup> They were no worse than their predecessors in using history, just more persistently bad at doing so.

The arguments among the Justices about history easily spilled over into serious disagreements about the nature of the judicial process and the scope of judicial review. Today we are prone to minimize the sharp debates between Black and Frankfurter over judicial activism and judicial restraint, doing so in favor of seemingly more sophisticated ideas such as originalism, noninterpretivism, and constitutive jurisprudence.<sup>59</sup> Throughout the 1960s, a majority of the Warren Court supported judicial activism, even to the point that the activists had themselves come to disagree about what they could and could not do. President Lyndon Johnson's decision to replace retiring Chief Justice Warren with Abe Fortas underscored the extent to which the Court had moved toward an activist role that included direct involvement by Fortas in the day-to-day business of the White House while he was a sitting Justice.<sup>60</sup>

Still, a critical minority on the bench, led by Justice Harlan, complained repeatedly that his brethren acted far beyond the traditional and understood boundaries set for Justices in our constitutional system. Harlan explicitly warned that recent history demonstrated the virtues of judicial restraint. Harlan and others argued that the Supreme

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56. WARREN, *supra* note 35, at 334-35.

57. HOLDSWORTH, *ESSAYS IN LAW AND HISTORY* 24 (1946).

58. See, e.g., the debate between Frankfurter and Black over religion in *Engel v. Vitale*, 370 U.S. 421 (1962); see also CHARLES MILLER, *THE SUPREME COURT AND THE USES OF HISTORY* 100-148 (1969).

59. See *supra* notes 3-6.

60. O'BRIEN, *supra* note 14, at 125-133; LAURA KALMAN, *ABE FORTAS* 310-18 (1991); *THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES* 270-73 (Kermit Hall ed., 1992).

Court before 1937 demonstrated repeatedly what the Justices should not do: interfere in areas that were properly not theirs to begin with.

Even more fundamental to this critique was the view that such interference actually sapped the democratic process of its vitality. It bred a sense of distrust in popular elected forms of government while placing too much trust in a judiciary that lacked the means even to command obedience to its decisions and that made its decisions in secret.<sup>61</sup> Felix Frankfurter explained in his dissent in *Baker v. Carr* that “[d]isregard of inherent limits in the effective exercise of the Court’s ‘judicial power’ may well impair the Court’s position as the ultimate organ of ‘the supreme Law of the land’ in that vast range of legal problems, often strongly entangled in popular feeling, on which this Court must pronounce.”<sup>62</sup> Justice Harlan added an additional note when taking exception to the Court’s later decision in *Reynolds v. Simms*, which introduced the concept of “one person, one vote.” Harlan wrote:

These decisions give support to a current mistaken view of the Constitution and the constitutional function of this Court. This view, in a nutshell, is that every major social ill in this country can find its cure in some constitutional ‘principle,’ and that this Court should ‘take the lead’ in promoting reform when other branches of government fail to act.<sup>63</sup>

Earlier Chief Justice Harlan Fiske Stone and Justice Robert H. Jackson had warned against the Court taking on too great a role. Jackson summed the matter up neatly by observing that a “4,000-word eighteenth-century document or its nineteenth-century Amendments” could not provide “some clear bulwark against all dangers and evils that today beset us internally.”<sup>64</sup>

Faced with this attack, the majority on the Warren Court found it necessary to offer a different explanation for its actions. Chief Justice Warren, for example, insisted that the Court merely acted at the call of those parties bringing cases before it. Warren stated:

There are many people, and I fear some lawyers, who believe that whenever the Court disapproves of some facets of American life, it reaches out and decides the question in accordance with its desires. We can reach for no cases. They come to us in the normal course of events or we have no jurisdiction.<sup>65</sup>

Justices Black and Douglas made clear, as well, that they were not going to be bound by precedent, and their attitude toward it fostered even more contention. For example, in the case of *Gideon v. Wainwright*, Harlan pleaded with the majority, which included Black and Frankfurter, that by refusing to abide by precedent the Court refused to recognize that in most matters it was more important that the applicable rule of law be settled than that it be settled right.<sup>66</sup>

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61. TINSLEY E. YARBROUGH, JOHN MARSHALL HARLAN 149-53 (1992).

62. 369 U.S. 186, 267 (1962).

63. *Reynolds v. Simms*, 377 U.S. 533, 620 (1964).

64. ROBERT H. JACKSON, THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT 57-58 (1955).

65. LEO KATCHER, EARL WARREN: A POLITICAL BIOGRAPHY 452 (1967).

66. 372 U.S. 335 (1963). While Harlan was willing to overrule precedent, he believed it deserved at

The Warren Court had little difficulty finding new areas to explore. To many of Warren's critics, his belief that the Court merely waited for cases to come to it was disingenuous. After all, the Warren Court revolution was not just substantive; it was procedural as well. The Justices significantly loosened such historical limitations on access to it as standing to sue,<sup>67</sup> and, perhaps most dramatically in *Baker v. Carr*, political questions.<sup>68</sup> Placed against this background, the Warren Court majority went well beyond simply responding to the wishes of the litigants.

Warren's argument nonetheless fitted the new reality of the 1950s and 1960s. The Warren Court benefitted from a long term development in which it emerged as the agency most likely to afford protection to minorities that could find no other avenue. Special interest group litigation predated the Warren Court by at least fifty years, but it matured during the 1950s and 1960s. One of the important historical developments of the first half of the twentieth century was the rise of so-called special interest litigation groups that expected to accomplish goals through the judicial process that were otherwise out of reach to them through the political process, susceptible as it was to prevailing shifts in public sentiment.

The American Civil Liberties Union, the National Association for the Advancement of Colored People, the National Lawyers Guild, the National Organization of Women, and various left wing, religious, labor, and ethnic organizations brought test cases designed purposefully to challenge what they believed were impediments to certain individual freedoms and civil rights.<sup>69</sup> Even the Department of Justice, which had pursued civil rights issues infrequently since Reconstruction, began during the Kennedy and especially during the Johnson administrations to press these matters before the federal courts. Moreover, these groups gathered additional incentives from the passage of major legislation, much of it prompted by the actions of the Court itself in the area of civil rights and voting rights in particular.

As judicial activism triumphed on the Court in the 1960s, more and more groups turned to the Justices for solutions. In the area of criminal justice the Warren Court's decisions extending the right to counsel and providing greater scrutiny of the major elements of criminal justice practice resulted in additional litigation before the Court, litigation that forced the Justices to further explain and expand the rationale for controversial landmark decisions.<sup>70</sup>

The Court's activism was both grist for the growing media and a pressure on the Court itself. The Warren Court, we should recall, was the first modern Court in the sense of having its work broadly evaluated for the public and, at the same time, in bringing a sense of humanity and approachability to the institution. Press coverage of the Court soared in the wake of *Brown*,<sup>71</sup> and it never came down. The Court became headline

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least a decent burial, especially from members of the Court who were not present when it had been established. *Id.* at 349.

67. *Flast v. Cohen*, 392 U.S. 83 (1968).

68. 369 U.S. 186 (1962).

69. RICHARD C. CORTNER, *THE SUPREME COURT AND THE SECOND BILL OF RIGHTS* 282 (1981).

70. *Escobedo v. Illinois*, 378 U.S. 478 (1964); *Miranda v. Arizona*, 384 U.S. 436 (1966); *In re Gault*, 387 U.S. 1 (1967).

71. *Brown v. Board of Education*, 349 U.S. 294 (1955).

news; it was a subject for nightly reporting on recently created television evening news. Even Justices Black and Douglas agreed to be interviewed at length about their views on the Constitution. Through books, magazines, newspapers, radio, and television, the Warren Court was presented to the world for evaluation and, depending on where one sat on the issue, either praise or condemnation in a way that no previous Court had experienced. The new light of publicity only amplified the already controversial nature of the Court's work.

Measuring public reaction to the Court during these years is difficult. Yet certain themes do emerge. Over time the American public has held the institution of the Court in generally high regard, embracing the need for the Justices at a level of unvarnished understanding that accepts their role without necessarily being able to explain it. The Warren Court inherited a public attitude toward the Court that was framed, at least in part, by the notion that the Justices in the 1920s and 1930s had been biased toward special privilege and vested interests and unwilling to cooperate with Congress during the New Deal to restore economic prosperity. The Court's so-called "switch in time that saved nine" in 1937 began a long term process of changing such attitudes among the citizenry and showing that the Court could be helpful in providing relief from the pressing problems of modern society. Significant aspects of the Court's behavior received strong, but not necessarily uniform, support. The decisions involving equal justice for African-Americans in *Brown* and the sit-in decisions received popular responses. There was also support for the extension of counsel to indigents, for the curtailment of excessive search and seizure and invasion of privacy, and for the end of rural domination of state legislatures.<sup>72</sup>

However, perhaps as much as any time in the nation's history, controversy and not consensus usually characterized reaction to the Warren Court. In 1968, as the stewardship of Warren drew to a close, the Gallup Poll asked Americans to rate the Supreme Court. The response indicated considerable skepticism: eight percent responded excellent; twenty-eight percent, good; thirty-two percent, fair; and twenty-one percent, poor.<sup>73</sup> The Court was most strongly supported among the young and the well-educated; it was most opposed in the South where its decisions, from race relations to free press to reapportionment, had the greatest impact.<sup>74</sup>

These numbers testify to the continuing suspicion on the part of many Americans about the proper functioning of the Court. Rather than being a force of stability, the Court had become such a powerful instrument of change that it threatened the social fabric.<sup>75</sup> While some of the Warren Court's holdings did receive support, many more of its landmark rulings produced real hostility, disobedience, and even calls for the impeachment of some of the Justices, including Warren. Particularly controversial were the Court's holdings in school prayer cases, pro-Communist speech and protest decisions, its obscenity rulings, and many of its criminal procedure rulings, particularly those that granted new protections to the accused and were, as a result, portrayed as coddling the

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72. See G. THEODORE MITAU, *DECADE OF DECISION: THE SUPREME COURT AND THE CONSTITUTIONAL REVOLUTION, 1954-1964* (1967).

73. *High Court Found In Disfavor*, 3 to 2, N. Y. TIMES, July 10, 1968 at A19.

74. *Id.*

75. See sources quoted in *supra* note 4.

criminal element. To many Americans, the nation seemed to be unraveling, and the Court seemingly contributed to that process.<sup>76</sup> While the Justices crafted constitutional decisions that opened the political and social systems, protest over civil rights, major urban rioting, and, by the end of Warren's tenure, dissent against the Vietnam War contributed to the unsettling of American society. The marketplace of ideas, some thought, had become a free-for-all in which obscene and libelous statements had crowded out civility, decency, and respect for authority.<sup>77</sup>

Moreover, liberal goals came to be mixed with notions of moral corruption, even depravity. Hence, war protestors and pornographers were lumped together as part of the problem of modern American culture, a problem seemingly sponsored by a latitudinarian Supreme Court.

Mobilization against the Warren Court was quite impressive, especially since Americans have repeatedly accorded the Court great respect even as they have taken often bitter exception to decisions that affect their lives. The Warren Court was no exception.<sup>78</sup>

Criticism of the Justices reached its crescendo in the nomination hearings of Associate Justice Abe Fortas to replace Warren. Senator Strom Thurmond of South Carolina asked Fortas in the course of the hearings to justify more than fifty cases decided by the Court involving the rights of the accused and obscenity that covered the entire course of the Warren Court era.<sup>79</sup> Fortas ultimately withdrew from consideration amid disclosures of conflict of interest. Fortas's life seemed to the Court's critics an affirmation of the inherent corruption associated with liberal judicial activism.

Similar resistance came from many state and local officials. Especially in the area of criminal justice procedure, the Warren Court's seemingly radical pronouncements often elevated into the realm of national constitutional protections practices that were already

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76. ALLEN J. MATUSOW, *THE UNRAVELING OF AMERICA: A HISTORY OF LIBERALISM IN THE 1960s* at 428 (1984).

77. *New York Times v. Sullivan*, 376 U.S. 254 (1964); Kermit L. Hall, *Justice Brennan and Cultural History: New York Times v. Sullivan and Its Times*, 27 CAL. W. L. REV. 339 (1990-91).

78. For example, following the Court's decision in *Brown*, most of the southern members of Congress issued a "manifesto" denouncing the decision and the Court. The remedy, according to southerners, was to limit the jurisdiction of the Court, an old chestnut regularly wheeled out against the justices. In 1957 Senator William Jenner of Indiana introduced during the later stages of the debate over the 1957 Civil Rights Act an omnibus anti-Court bill "to limit the appellate jurisdiction of the Supreme Court in certain cases." MURPHY, *supra* note 40, at 332. Jenner claimed that "by a process of attrition and accession, the extreme liberal wing of the Court has become a majority; and we today witness the spectacle of a Court constantly changing the law, and even changing the meaning of the Constitution, in an apparent determination to make the law of the land what the Court thinks it should be." 103 CONG. REC. 12, 806 (1957). So serious was the threat to the Court, that Senator Jacob Javits of New York, a liberal, proposed a law to prevent Congress from interfering with the Court's appellate jurisdiction. 104 CONG. REC. 7807, 7843-50, 9143-45 (1958). Neither measure passed; nor did other efforts by Congressman Howard Smith of Virginia and Senator John M. Butler of South Carolina to limit other parts of the Court's jurisdiction with regard to criminal justice procedures and the ability of the Court to review state legislation, including segregation measures. MURPHY, *supra* note 40, at 332-33.

79. *Attempt to Stop Fortas Debate Fails by 14-vote Margin*, XXIV CONG. Q. ALMANAC 531, 534 (1968).

well-established in the states.<sup>80</sup> In other instances, however, the innovation by the Justices stirred protest from below. Many state political leaders, and not all of them in the South, believed that the Court had become too involved in monitoring their historic functions in areas including voting practices, apportionment, racial segregation, education, censorship, loyalty, and welfare programs. State judicial leaders also expressed their dismay at the Court's criminal justice rulings. The Conference of State Chief Justices in 1958 passed a resolution blasting the Warren Court's "policy-making" and proclaiming that "strong state and local governments are essential to the effective function of the American system of federal government. . . ."<sup>81</sup> Four years later the annual meeting of the Council of State Governments adopted a proposal for "returning the Constitution to the states and the people."<sup>82</sup> That proposal included a plan for the creation, through a constitutional amendment, of a "Court of the Union," comprised of the fifty state Chief Justices, to review the work of the Supreme Court.

Even the American Bar Association, itself an aggregation of local and state bars, contributed to the attack on the High Court. The ABA's House of Delegates refused to endorse the active support given by the Warren Court to sustaining the Bill of Rights, an action which prompted Warren's quiet resignation from that organization.<sup>83</sup>

The political right wing took aim at the Chief Justice and his brethren. The John Birch Society in the late 1950s launched a nationwide campaign to stir popular support for the impeachment of the Chief Justice, a campaign that included billboards sprinkled across the American countryside that simply proclaimed: "Impeach Earl Warren." The Birch Society even sponsored an essay contest with an award to the best paper on the subject: "Grounds for the Impeachment of Earl Warren."<sup>84</sup> The Texas millionaire H. L. Hunt used his fortune to sponsor radio and television programs that attacked the Chief Justice and Associate Justice William O. Douglas. The most extreme demands were registered by Fulton Lewis, Jr. and retired Marine Colonel Mitchell Paige, both of whom proposed before public audiences that Warren should be hanged.<sup>85</sup>

#### IV. IN HISTORICAL PERSPECTIVE

Current fashion among many Warren Court scholars holds that its Justices did less than we would have supposed, that in the end it was little different from either its successors or predecessors, and that what achievements it did earn turn out not to have been as significant as once believed. Hence, it is now stylish to think of the Burger Court

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80. *Mapp v. Ohio*, 367 U.S. 643, 654 (1961) (holding that evidence obtained by unconstitutional searches and seizures is inadmissible in state courts); *Miranda v. Arizona*, 384 U.S. 436, 444 (1966) (holding that prosecution may not use statements stemming from custodial interrogation of defendant unless it demonstrates use of procedural safeguards); *Gideon v. Wainwright*, 372 U.S. 335 (1972) (holding that right of a criminal defendant to counsel is fundamental).

81. MURPHY, *supra* note 40, at 477 (quoting C. HERMAN PRITCHETT, CONGRESS VERSUS THE SUPREME COURT, 1957-1960 at 141-59 (1961)).

82. MURPHY, *supra* note 40, at 478 (quoting STATE GOVERNMENT, XXXVI 10-15 (Winter 1963)).

83. WARREN, *supra* note 35, at 321-31.

84. MURPHY, *supra* note 40, at 482.

85. KATCHER, *supra* note 65, at 3.

as an extension of the Warren Court and in so doing to denigrate the achievements of the latter. Other commentators have suggested that, in the end, the Court was hypocritical; it did not go as far as it could have in such crucial areas as race relations and gender discrimination. In the former it accepted only "all deliberate speed" and in the latter it simply ignored obvious discrimination against women. Indeed, there is now an effort to demonstrate that Warren and his colleagues really were not politically motivated, that they did not take big risks, and that they were confused in their agenda. There are no *good* insights, we are once again reminded, only *new* insights.

Sometimes simple lessons are the most difficult to grasp. The current wave of revisionism surrounding the Warren Court has missed the essential historical point that its liberal majority was important because it had the courage to be in tension with the dominant political culture. The Warren Court was historically significant not just for what it did, which was substantial, but for reaffirming that the Justices could help to shape public policy and that their role in doing so was appropriate and constitutionally defensible, even if it was not popular. At the same time, the approach to judging adopted by the majority of the Justices did break historically from the pretense that judges merely judge and the associated idea that law is an autonomous profession. The Warren Court disrupted the prevailing consensus that the goals of law were to train professionals in analytical reasoning to be applied in narrow ways to appellate opinions. The Court, according to the older view, was important not because it made policy but because it imposed certain institutional and doctrinal restraints on the political branches through precedent and a close reading of the Constitution. The Warren Court Justices had another goal. They were willing to turn to extra-legal materials, as was the case in footnote eleven of *Brown*, and willing to usher in, according to G. Edward White, the first stirring of the "law and" movement.<sup>86</sup> The High Court became a place where practical politics, social scientific learning, and morality were viewed as more comfortably fused in Supreme Court decisions than ever before.

What the Warren Court did was to reintroduce political culture into mainstream constitutional discourse, something that had not been present so significantly since the debate over slavery in the Taney Court of the mid-nineteenth century. Since the Warren Court, it has been impossible to separate social domination from political domination in matters of constitutional debate.<sup>87</sup> Warren and his colleagues brought a pragmatic focus to American constitutional law, one that has surely altered it for years to come.

With the retirement of Warren an era certainly did come to an end, in large measure because the Chief Justice, in his unassuming but persistent ways, had managed to become the symbol of it. Much like the period following the death of John Marshall, an era of unprecedented general judicial assertion of power came to an end. That is not to say, of course, that the jurisprudence of the Warren era ended, which is an entirely different matter. Chief Justice Warren Burger was, in this regard, something of a disappointment to those conservatives who expected a sharp turn to the jurisprudential right. The Warren Court holdovers, most notably Douglas, Brennan, and Marshall, were usually able to get

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86. White, *supra* note 21, at 49.

87. Morton J. Horwitz, *The Warren Court: Rediscovering the Link Between Law and Culture*, 55 U. CHI. L. REV. 450, 455 (1988).



the fourth, fifth, and often sixth vote to maintain and, in some instances, actually expand liberal decisions of the Warren era.

We should in all matters of historical interpretation respect the obvious at the same time we doubt it. To borrow a phrase from the current student vernacular, all of the “heavy lifting” was done in the Warren era. One of the Warren Court’s most important achievements was the acknowledgement of concrete human realities and the qualities of empathy, compassion, and justice as central to constitutional decision making. That was new in the American constitutional tradition. The legacy of the Warren Court, therefore, was not simply in the case law that it propounded, some of which has been narrowed although none of it abandoned, but in the general approach that it took toward judging, the judicial process, and the role of the Court in opening to many new groups the promise of American life.

Like sharks, scholars have no choice but to move forward. Hegel was right; there is a scholarly dialectic. But in pursuing that dialectic, we should at least honor the past on its own terms. If we do so, then we will appreciate that the Warren Court, when placed in historical perspective, is and will continue to be, the ghost present at the constitutional banquet served each year beginning on the first Monday in October.